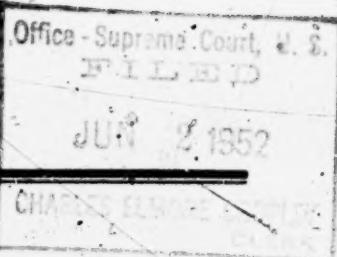


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IN THE

Supreme Court of the United States

October Term 1952

No. [REDACTED] MIS. [REDACTED]

392

391

HARRY A. STEIN,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT
OF APPEALS OF THE STATE OF NEW YORK WITH
BRIEF IN SUPPORT THEREOF

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**Petition for Writ of Certiorari to the Court of Appeals
of the State of New York**

*To the Honorable Fred M. Vinson, Chief Justice, and the
Associate Justices of the Supreme Court of the United
States:*

Your petitioner, Harry A. Stein, respectfully repre-
sents the following:

Summary Statement of Matter Involved

Your petitioner, together with Calman Cooper and Nathan Wissner, whose petitions for writs of certiorari to the Court of Appeals of the State of New York are being presented separately, was, on December 21, 1950, convicted of the crime of murder in the first degree, after trial before a jury in the County Court, Westchester

County, New York State, and on December 27, 1950 petitioner was sentenced to be executed, as were the said Calman Cooper and Nathan Wissner* (Rec., 2801-2)**.

Upon appeal to the Court of Appeals of the State of New York, the judgment of conviction, as to all three, was, on March 6, 1952, unanimously affirmed, without opinion.

The petitioner is under sentence of death.

A written confession of petitioner was admitted in evidence (Rec., 1969-1981; 2897-2903, Respondent's Exhibit 64), as were certain prior and subsequent oral statements (Rec., 240-1; 1700; 1909; 1991; 2160-4; 2238), over objection and exception by petitioner, and objection was specifically made that the admission of said written confession and oral statements was a denial of "due process" under the Fourteenth Amendment of the Constitution of the United States***.

The remittitur of the Court of Appeals of the State of New York, as amended by order dated April 18, 1952, recites, *inter alia*, that:

"Questions under the Federal Constitution were presented and necessarily passed upon by this Court, viz: * * * (2) whether the admission in evidence of the confession and the prior and subsequent oral statements of the defendant Stein violated his rights under the Fourteenth Amendment of the Constitution of the United States; * * * This Court held that the rights of the defendants under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied."

* A stay of execution, as to all three petitioners, was granted by Order of Mr. Justice JACKSON, dated April 7, 1952.

** References are to pages of Record on Appeal in the Court of Appeals of the State of New York.

*** For all such objections, see Rec., 160; 228-30; 1582-3; 1700; 1705; 1707-8; 1900; 1966-7; 1989-90; 1992; 1994; 2128; 2139-40; 2154; 2238; 2243.

The question here presented is whether the admission in evidence of "the confession and the prior and subsequent oral statements" of this petitioner, who seasonably and at every stage of the trial objected to their introduction, was a denial of due process under the Fourteenth Amendment of the Constitution of the United States.

Details of Crime

On April 3, 1950, at about 3 P.M., at which time it was raining (Rec., 211), four robbers held up a truck owned by the Reader's Digest Association on the private roadway leading from the Reader's Digest plant at Chappaqua, New York, at a point near its intersection with Route 117 (Bedford Road). The truck was being operated by William Waterbury, who was accompanied by a messenger, Andrew Petrini (Rec., 214). A single shot, fired by one of the robbers (Rec., 215), passed from the outside through the window glass of the right hand door of the truck, penetrated Petrini's head, and caused his death a few hours later (Rec., 167; 171-2).

The Testimony

The testimony affecting petitioner was given by one Dorfman, held to be an accomplice as a matter of law (Rec., 2728), whose testimony was not corroborated as required by Section 399 of the Code of Criminal Procedure of New York State*; by Regina Dorfman, the wife of the accomplice, and Michael Homishak, witnesses called for the purpose of corroborating the accomplice, but whose testimony showed, at most, association of petitioner with the accomplice, which, under the decisions of New York State, is insufficient to establish corroboration (*People v.*

O'Farrell, 175 N. Y. 323, 325; *People v. Kress*, 284 N. Y. 452, 459); and by the witness Waterbury.

This witness, the driver of the truck, claimed to have seen petitioner's face for only a second or two (Rec., 434), in the dark, while the witness was lying, face down, on the floor of the interior of the truck (Rec., 423), with petitioner on his back tying the witness' hands *or* feet (Rec., 216; 426; 444-6), by turning his head to the left, on which side the witness' sight was seriously impaired (Rec., 435), he having less than 25% vision in the left eye (Rec., 286). Within several hours after the commission of the crime, the witness made a statement to the Chief of Police and the District Attorney, at complete and unreconcilable variance with his testimony upon the trial (Rec., 2934, petitioner Wissner's Exhibit A).

Whether the evidence, apart from the confession and the prior and subsequent oral statements, was sufficient to justify the verdict of guilty is of no moment. They (the confession and statements) were introduced over petitioner's objection; if by their admission petitioner was deprived of his constitutional right to due process under the Fourteenth Amendment to the Constitution, the error requires reversal.

Bram v. United States, 168 U. S. 532, 533, 540-42;
Stromberg v. California, 283 U. S. 359, 367, 368;
Lyons v. Oklahoma, 322 U. S. 596, 597;
Malinski v. New York, 324 U. S. 401, 404;
Haley v. Ohio, 332 U. S. 596, 599, 606;
Turner v. Pennsylvania, 338 U. S. 62;
Harris v. South Carolina, 338 U. S. 68.

Such being the established rule of this Court, no attempt will be made to analyze the evidence, except as it applied to the manner in which the statements were obtained; if they, *or any of them*, were improperly admitted

and a constitutional right denied, this Court will not attempt to evaluate their effect (*Malinski v. New York*, *supra*, at p. 404; *Gallegos v. Nebraska*, 342 U.S. 55, 63; *Stroble v. California*, 343 U.S.).

In the *Stroble* case, decided by this Court April 7, 1952, Mr. Justice DOUGLAS, in a dissenting opinion which, in this respect, was not in conflict with the holding of the majority, stated, at p. :

"The fact that the later confessions may have been lawfully obtained or used is immaterial. For once an illegal confession infects the trial, the verdict of guilty must be set aside no matter how free of taint the other evidence may be. *Malinski v. New York*, 324 U. S. 401, 89 L. ed 1029, 65 S. Ct 781."

Circumstances Under Which Confession and Oral Statements Obtained

Though the petitioners Cooper and Wissner are applying for writs of certiorari herein by filing their respective petitions and briefs separate from those of petitioner, we feel that only by considering the three together, each in the light of the other, can the members of this Court have a true understanding of the composite, total picture of wanton and deliberate violation of the constitutional rights of these petitioners. The physical condition of *all three petitioners* almost immediately upon their release from the custody of the State Police; the unmistakable evidence of physical beatings *in all three cases*; the shocking measures regularly, and as a matter of admittedly routine procedure, resorted to by the State Police in the detention of persons not even suspected of having any connection with the commission of the crime under investigation; the mental coercion exerted upon petitioners

through holding members of their families as hostages, i.e. the holding of petitioner Cooper's 65 year old father, in handcuffs, for 59 hours (Rec., 1371); the heaping of indignities upon the relatives of suspects, e.g.: fingerprinting and photographing (Rec., 2998-9; 2999A; 3002; 3004), and, in the case of petitioner Wissner's wife, obliging her to sleep on a bare mattress, on the floor of the Barracks (Rec., 1656); the extortion of a general release as the price of freedom (Rec., 2252-3; 2255; 2960, petitioner Wissner's Exhibit S); the inexcusable delay in arraigning these petitioners* (Rec. 2008; 2019; 2043)—all point, unerringly, to an atmosphere which was "inherently coercive", an ugly spectacle which is a reproach to our American way of life, with its traditional sanctity of the rights and dignities of free men.

The undisputed facts appearing in the record constitute a searing indictment of the oppressive methods regularly and systematically employed by the New York State Police.

The Arrest.

At 2 A.M. on June 6, 1950 petitioner was arrested, without warrant, at the home of his brother, Lou Stein, with whom he was residing on East 3rd Street, in Manhattan, New York City, by Detectives Mulligan and Whelan of the New York City Police, accompanied by several officers of the New York State Police (Rec., 1958-60).

Before being taken from the home of his brother, petitioner requested that John Duff, an attorney with an office in New York City, be notified (Rec., 1687; 1960). Detective Mulligan, the senior officer and spokesman for the arresting group, testified that he knew of Mr. Duff, and

* Vide Appendices C and D. (Sections 165, Code of Criminal Procedure and 1844 Penal Law of New York State, governing arraignments).

knew that he was an attorney, though he did not know him personally* (Rec., 1962).

Trooper Crowley, one of the arresting officers, testified that petitioner "wanted to get hold of" Duff (Rec., 1687). He noticed nothing abnormal about petitioner's arms while petitioner, in his underwear, was washing up (Rec., 1986-7).

Outside the apartment petitioner was handcuffed, placed in an automobile, driven to 14th Street and First Avenue, New York City, where he was transferred to another car without State Police insignia (Rec., 1699), belonging to one of the State Troopers, and driven to the Barracks of the State Police, at Hawthorne, where he arrived at approximately 3 A.M. that day (Rec., 1689).

Detective Mulligan, although he admitted "the law says we must book him" (Rec., 1963), did not book petitioner at any station house in New York City, but, instead, turned petitioner over, at the point of transfer, to the State Troopers (Rec., 1688, 1963).

The Detention and Interrogation.

The Barracks of Troop K of the New York State Police, at Hawthorne, are located in a secluded, rural section of Westchester County. The buildings are completely isolated, with no surrounding buildings, and no possibility of outcry being heard, or occurrences therein being witnessed by any outsider (Rec., 1340). The nearest building, a school house, is distant "1000 feet or more" from the Barracks (Rec., 1340).

For 68 hours petitioner was illegally detained, almost continuously in handcuffs, and, except for repeated ques-

* The first person petitioner asked to be notified, and saw, the day after his release from the custody of the State Police, was this same attorney, John Duff (Rec., 1836; 1846).

tioning, held incommunicado in these Barracks, "under the exclusive control of the police, subject to their mercy and beyond the reach of counsel or of friends" (Mr. Justice DOUGLAS, in *U. S. v. Carignan*, 342 U. S. 36, 39), before being arraigned before a Magistrate *at ten o'clock at night* on June 8, 1950,* during which period of illegal detention a written confession, as well as certain prior and subsequent oral statements, was obtained.

Isolated as are the Barracks, the section thereof in which petitioner was lodged, and where most of the questioning took place (the locker room, Day Room and "B. of I." office, located in the basement of the main building, Rec., 1905), is equally free of hindrance or supervision from outside sources. There are no detention cells (Rec., 1369); no sleeping quarters are provided for prisoners or suspects (Rec., 1369; 1929), and a prisoner must rely upon the generosity of the police for his food (Rec., 1907, 2010).

Captain Glasheen, in command of the Barracks, did not know the precise time when petitioner was taken to the locker room, but conceded that it could have been "after his fingerprints were taken early in the morning of June 6" (Rec., 1922). He there questioned petitioner from 10 A. M. to 11 A. M. on June 6, with an armed guard present (Rec., 1906), at which time petitioner denied any connection with the Reader's Digest crime (Rec., 1906).

Shortly after 1 P. M., on June 6, the questioning was resumed by Glasheen, in the locker room, at which time Sergeant Johnson was present, as were other officers and armed guards (Rec., 1907; 1925). This particular session

* It is worthy of note that petitioners were arraigned on the evening of the day on which a writ of habeas corpus, obtained by Duff on behalf of petitioner Stein, in the county where the latter was arrested (New York), was returnable (Rec., 296-2969, petitioner Stein's Exhibits EE, FF and GG).

lasted until 4 or 4:30 P. M., with petitioner still protesting his innocence.

That same day, "around 6:30 that evening" (Rec., 1926), the ordeal of questioning was once again resumed, in the locker room, this time for a more protracted period, lasting until 2:15 or 2:30 in the morning of June 7, during all of which time petitioner, then 52 years of age, was kept awake* and in handcuffs (Rec., 1926). The questioning was again conducted by Glasheen, "with other troopers and officers". On this occasion, between 2:15 and 2:30 A. M., Glasheen "read two questions and answers" from Cooper's confession to petitioner (Rec., 1939; 1954), who still proclaimed his innocence.

Considering the source, the estimate as to the number of hours spent in interrogation of petitioner is certainly not exaggerated. Throughout this entire period of intensive questioning, badgered and beleaguered at will, without the aid of counsel whose assistance he had sought, from the moment of his arrest, and without the solace of relatives or friends, petitioner maintained his innocence.

Finally, at about 10 A. M. on June 7, the contest of endurance and attrition came, inevitably, to an end. In response to a message from Johnson, who had been with petitioner, Glasheen returned to the locker room; at that time, supposedly, petitioner, in the presence of Glasheen and Johnson, made an oral statement implicating himself. Its details were not put in evidence (Rec., 1908-9).

How long Johnson had been with petitioner does not appear in the record. Upon the preliminary examination

* "It has been known since 1500, at least that deprivation of sleep is the most effective torture and certain to produce any confession desired." Report of Committee on Lawless Enforcement of Law, made to the Section of Criminal Law and Criminology of the American Bar Association (1930). American Journal of Police Science 575, 579-80, also quoted in IV Wickersham Report on Law Observance and Enforcement, p. 47.

as to the voluntariness of the confession, Johnson was not called as a witness by the People, nor was any other Trooper, to account for the 16 of the first 32 hours of petitioner's illegal detention which remained unaccounted for after Glasheen's testimony.

Although the first oral statement by petitioner was supposedly made some time between 10 A. M. and 11 A. M. on June 7, the written confession, made in the "B. of I." office (Rec., 1911), was not signed until 4:30 that afternoon (Rec., 1914). The stenographer, a former employee of the Reader's Digest Association (Rec., 1659), testified that the questioning was conducted by Glasheen, with Sergeants Johnson and Sayers present, as was Detective Whelan of the New York City police during part of the questioning. She testified that there were discussions between the group which she did not take down (Rec., 1614-21), and that after the questioning she saw petitioner sitting with his eyes closed (Rec., 1653). Glasheen testified that after the confession was signed, petitioner was given a tray of food (Rec., 1915).

There were subsequent oral statements testified to by the police: Detective Mulligan testified that at 11 P. M. on June 7, in a conversation with petitioner, had in the presence of Sergeant Sayers "and other troopers", petitioner referred to Cooper's "putting him into the seat" (Rec., 2238-9):

Glasheen testified that on June 8, "shortly before noon", petitioner described to him the clothing he wore on the occasion of the robbery, and, at Glasheen's suggestion, gave Sergeant Manopoli a note to petitioner's brother, directing the latter to turn the clothing over to the bearer of the note (Rec., 1989; 1991). Neither the note nor any of the articles of clothing were offered in evidence.

Trooper Crowley testified that, on the afternoon of June 8, petitioner accompanied the witness and Glasheen to the premises of the Reader's Digest, where petitioner pointed out to them various locations (Rec., 1704-5).

On June 8, at about 6:15 P. M., in the presence of the District Attorney, Glasheen, Johnson and "armed guards", petitioner supposedly "identified" the witness Waterbury as the "driver of the truck" (Rec., 240-1; 2917, Respondent's Exhibit 75).

After the arraignment on June 8, *while still in the custody of the State Police*, petitioner supposedly made a further statement to Glasheen, in the presence of other troopers, which statement was in the nature of a clarification as to the use of the truck employed in the robbery (Rec., 1996).

Counsel's Search.

It is undisputed that, at the time of his arrest, petitioner requested that John Duff, the attorney, be notified (Rec., 1687; 1960). Lou Stein, petitioner's brother, complied by phoning the attorney at the latter's home at 7:20 A. M. June 6, 1950 (Rec., 1828).

Duff testified to the efforts he made to locate petitioner, efforts which were unavailing because of the fact that petitioner was taken into custody by Detectives Mulligan and Whelan *of the New York City police*, accompanied by other officers dressed in civilian clothes, whose identities were then unknown, and that he (the witness) "had every reason to believe that he [petitioner] was in the custody of the New York City police, because he had been arrested by a New York City detective, Mulligan" (Rec., 1850).

Though there was some question whether petitioner's brother was advised of petitioner's destination, we submit

that the undisputed proof in the record establishes, without substantial challenge, that he was not, as witness the fact that Dorfman and Wissner had not, at the time, been apprehended (Rec., 2019). The aura of secrecy which attended petitioner's arrest, detention, inquisition and confession, which was not dissipated until his arraignment, 68 hours after his arrest, is consistent with failure of disclosure.

In addition to inquiring at various station houses in New York City, at Police Headquarters in New York City, at the Felony Court in the Borough of Manhattan of the City of New York, at the office of the then Police Commissioner of New York City, William O'Brien, Duff sought to communicate personally with Detective Mulligan, and left his phone number at the latter's office, with the request that the detective phone him "as soon as possible" (Rec., 1829), to which request, made on the day of petitioner's arrest, he received no response.

Finally, on June 8, 1950, Duff sued out a writ of habeas corpus in New York County (Rec., 2968, petitioner's Exhibit FF for identification). At ten o'clock that night all three petitioners were arraigned before a Magistrate, after, in the case of petitioner, 68 hours of illegal detention; in the case of petitioner Cooper, 86 hours of illegal detention, and, in the case of petitioner Wissner, the non-confessing defendant, 38 hours of illegal detention.

It was established that the judge before whom petitioners were arraigned had been available, during the period of petitioners' detention, "24 hours a day", "at any time or any hour, around the clock" (Rec., 1270).

The Injuries.

Shortly before midnight on Thursday, June 8, the State Police lodged the three petitioners in the County Jail (Rec., 1273; 1858; 2517-8). Apart from the short period of time consumed in arraigning them before the Magistrate, they had been held incommunicado, separate and apart from each other, from the times of their respective arrests.

Early on the morning of June 9 the jail physician, Dr. Vosburgh, examined the three petitioners, each of whom was brought to the doctor's clinic *alone*, from distantly separated parts of the jail. No other prisoner was present when the doctor examined each one individually (Rec., 1860-1).

On petitioner Wissner, the first to be examined, he observed bruises on the left side of the chest. The fifth rib on the left side was broken, according to Dr. Vosburgh's record of June 9; the sixth rib on the left side was also broken, as disclosed by the X-ray report of June 12. There were abrasions of both shins, bruised areas on the thighs, the left side of the abdomen and the buttocks, and a bump on the head (Rec., 2954, Exhibit R; 3011-2, Exhibit PPP, petitioner Wissner's medical records).

On petitioner Stein, next to be examined, the doctor's report showed multiple bruises "in the left upper arm, between the elbow and the shoulder" (Rec., 1713; 2909-10, Respondent's Exhibit 65, Stein's medical record). The witness Duff examined petitioner Stein the same day, at about 3 P.M. (Rec., 1838), and made a record, in short-hand, of his observations, which record was produced upon the trial (Rec., 1840, Stein's Exhibit HH for identification). He observed that "there were bruises on the left arm, his right arm and the left lower ribs below the breast" (Rec., 1839). Duff observed and made note of the dimensions of the bruises, as follows: "The left arm, area of

discoloration and bruises, approximately 7 inches long and 4 inches wide. Right arm, above the elbow, discoloration and bruises about 3 inches long and 1 inch wide. Left lower chest, second, third and fourth ribs, from the floating ribs to the left and below left breast, black and blue marks in area approximately 3 by 4 inches" (Rec., 1840):

On petitioner Cooper, the last of the three petitioners to be examined by Dr. Vosburgh on the morning of June 9, the latter found "bruises on the left posterior lateral chest, abdomen, in the right bicep area, and on both buttocks" (Rec., 1237-9; 2971, Exhibit BBB, petitioner Cooper's medical record).

Thomas J. Todarelli, a member of the New York Bar, testified to extensive injuries which he and two other attorneys observed and measured on the person of petitioner Cooper on June 10, 1950 (Rec., 1260-2). His description supplements that of the jail physician, just as Duff's observations and notations supplement the doctor's record of petitioner Stein's injuries.

A week later Duff again examined petitioner Stein, and observed that "The bruise marks on the left arm were faintly discernable (sic), those on the left arm were not as pronounced as on the first occasion when I observed them on June 9, but they were still clearly noticeable. The bruises in and about the ribs were still clearly noticeable" (Rec., 1841).

The prosecution did not question this witness concerning the injuries which he described, and, in fact, conceded that he would not commit perjury (Rec., 1845). On summation the District Attorney frankly stated that he did not question the witness' observations, but sought to account for the injuries described by him on the theory of self-infliction (Rec., 2707-8).

The Complaint.

On June 16, 1950 petitioner personally entered a plea of Not Guilty to the original indictment*, and requested that counsel be assigned to represent him (Rec., 1848-9). Though Duff was present in Court on that occasion, he emphasized that he was there "to note" his "withdrawal from the case" (Rec., 1848), although it is undisputed that, despite the witness' use of the word "withdrawal", he had never appeared in Court on behalf of petitioner.

No assignment of counsel was made until July 24, 1950 (Rec., 14; 15), after which assignment complaint was made, on August 14, 1950, in the form of a proceeding brought under Article 78 Civil Practice Act (New York) to suppress the confession, which proceeding was brought in the Supreme Court of Westchester County (Rec., 1842).

The People's Explanation for the Injuries.

In an endeavor to account for the undisputed proof of physical injury to all three petitioners, the prosecution advanced the theory of self-infliction. In the case of petitioner Stein, the theory was advanced, *for the first time*, in the course of the prosecutor's closing remarks to the jury, when he stated: "I am not saying that Mr. Duff is not telling the truth; but Dr. Vosburgh said that those injuries could have been self-inflicted" (Rec., 2707-8).

Actually, Dr. Vosburgh never testified that, as to petitioner Stein, the injuries could have been self-inflicted.

The other half of the dual apologia for the injuries sustained by petitioner was the contention, founded upon the answer to a hypothetical question put to Dr. Vosburgh, not based upon any evidence in the case, that the injuries which petitioner sustained could have been inflicted by the

* A superseding indictment was filed on June 30, 1950 (Rec., 8).

"grasp" of a "strong, healthy officer with a strong grip" (Rec., 1740).

Thus did the prosecution seek to sustain the *burden of proof* imposed upon it by law of explaining the manner in which the injuries were sustained (*People v. Barbato*, 254 N. Y. 170, 176; *People v. Valletutti*, 297 N. Y. 226, 230).

Grounds Upon Which the Jurisdiction of This Court is Invoked

It is respectfully submitted that this Court has jurisdiction of this petition for certiorari under Section 1257 (3) of the United States Code (as amended by the Act of June 25, 1948), such petition being one to review the final judgment of the Court of Appeals of the State of New York in which a decision could be had, rendered March 6, 1952.

The judgment affirmed a judgment sentencing petitioner to death (Rec., 2801-2); and in said Court of Appeals petitioner especially set up and claimed, under the Fourteenth Article of Amendment of the Constitution of the United States, the right, privilege and immunity against being deprived by the State of New York of his rights, life and liberty without due process of law, and, as certified by said Court of Appeals, this point was "presented and necessarily passed upon by this Court" (Order Amending Remittitur, dated April 18, 1952), the point having been specifically presented in the brief and reply brief on behalf of petitioner, on the argument of the appeal from the judgment of conviction and death of the County Court of Westchester County, New York State, and specifically on the trial (See page references contained in footnote ***, page 2 *suprd*).

Reasons Relied Upon for the Allowance of the Writ

The Court of Appeals of the State of New York has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court, in that the Court of Appeals of the State of New York has affirmed a judgment and sentence of death wherein the "total situation" out of which the confession and prior and subsequent oral statements of petitioner came, "and which stamped their character", *was and could only have been* one of coercion, whereby petitioner was deprived of his rights, life and liberty without due process of law.

See:

- White v. Texas*, 309 U. S. 631;
- Ashcraft v. Tennessee*, 322 U. S. 143;
- Lyons v. Oklahoma*, 322 U. S. 596;
- Malinski v. New York*, 324 U. S. 401;
- Haley v. Ohio*, 332 U. S. 596;
- Watts v. Indiana*, 338 U. S. 49;
- Turner v. Pennsylvania*, 338 U. S. 62;
- Harris v. South Carolina*, 338 U. S. 68;
- Gallegos v. Nebraska*, 342 U. S. 55;
- United States v. Carignan*, 342 U. S. 36;
- Stroble v. California*, 343 U. S. .

WHEREFORE, your petitioner, Harry A. Stein, prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Court of Appeals of the State of New York, commanding the said Court to certify and send to this Court, for review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had therein; and that the order of the Court of Appeals of the State of New York affirming the judgment in this cause may be reversed, and

that the petitioner, Harry A. Stein, may have such other and further relief in the premises as this Court may deem proper.

Dated, May 26, 1952.

HARRY A. STEIN,
Petitioner.

PHILIP J. O'BRIEN,
JOHN J. DUFF,
Counsel for Petitioner.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, }ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari, and that, in my opinion, it is well founded and the cause is one in which the petition should be granted.

PHILIP J. O'BRIEN,
Counsel for Petitioner.

IN THE
Supreme Court of the United States

October Term, 1951

No.

HARRY A. STEIN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

**BRIEF IN SUPPORT OF PETITION FOR
CERTIORARI**

The Court of Appeals of the State of New York, in affirming the judgment of conviction herein, rendered no opinion (see Weekly Advance Sheets No. 675, April 5, 1952, 303 N. Y. 856).

**Statement of Jurisdiction, Question Presented
and Facts**

The statement under which the jurisdiction of this Court is invoked, as well as the statement of the question presented, and the factual matter relevant to this application appear in the petition to which this brief is annexed.

Argument

Petitioner urges that he has been convicted of the crime of murder, and sentenced to death as the result of a trial in which there were received in evidence against him, over his objection, a confession, as well as certain prior and subsequent oral statements, obtained after prolonged interrogation, which confession and oral statements were the result of police violence or coercion, or both, and the continuing fear and effect thereof, while petitioner was being illegally detained, incommunicado, all in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

POINT I

The admission in evidence of petitioner's confession and prior and subsequent oral statements was a violation of the rights of petitioner under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The question here involved is whether the confession of petitioner, made on June 7, 1950, as well as a prior oral statement made the same day, and certain subsequent oral statements made that day and the following day, all received in evidence over his objection and exception, were made under such circumstances as to render them, *or any of them*, inadmissible under the applicable decisions of this Court and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioner did not testify upon the preliminary examination as to the voluntariness of the confession and oral statements. As we have pointed out in the petition, however (page 15, *ante*), petitioner, after counsel had been

assigned to represent him, brought a proceeding in the New York Supreme Court, under Article 78 of the New York Civil Practice Act, to suppress his confession upon the ground that the same had been obtained during a period of illegal detention, after prolonged questioning, and through police violence and coercion, all in violation of his constitutional rights. Petitioner's supporting affidavit sets forth in great detail the acts complained of. The proceeding was dismissed, upon the ground that "Whether the confession was voluntary or not can be tried at the trial by the jury. Their determination will indicate whether the grave charges made against the police are true, and that determination will indicate the course then to be pursued"**.

No other method is provided in New York State whereby a defendant who claims that his confession was an involuntary one can himself give sworn proof of what took place in the confession chambers, without being compelled to testify, and thus subject himself to questioning on the principal crime charged in the indictment, before the very jury which is trying the ultimate question of his guilt or innocence.

The procedural risks which beset a defendant who would be heard on the question of the voluntariness of his confession are a deterring consideration. There is no

* It recites that at the time of arrest Detective Mulligan and Trooper Crowley promised to notify petitioner's lawyer, Duff; that after arrival at the Hawthorne Barracks, and until he confessed, petitioner was repeatedly punched and kicked by different Troopers; that he was compelled to remain awake; that he was refused food; that he asked for his lawyer on numerous occasions, and each time was kicked and told that he could not see him, that he was police property, and that if he continued to "holler" for his lawyer the Troopers would kill him. He was told that his sweetheart was being detained, and that she would be released only when he had confessed.

** Order of Mr. Justice Schmidt, Justice of the New York Supreme Court, Westchester County, which appeared in the New York Law Journal of September 15, 1950.

provision for trying the issue out of the hearing of the jury, as is the case in the federal courts, as well as in many state jurisdictions. Under the procedure in New York State a defendant who would contest the validity of his confession is confronted with a dilemmatic choice which is at conflict with the spirit of the privilege against self-incrimination.

In any event, we respectfully submit that the fact that petitioner did not testify is a circumstance of no significance, in view of the undisputed proof in the record both as to petitioner's physical condition at the time of his arrest (Rec., 1986-7) and, as recorded by the jail physician and a member of the New York Bar, his condition almost immediately after his release from the custody of the State Police (page 13, *ante*), and in view, also, of the injuries to petitioners Cooper and Wissner (pages 13, 14, *ante*). This uncontested proof, of itself, speaks more eloquently of police violence than any testimony which petitioner might have given.

We feel that the independent examination which this Court has stated it is its duty to make (*Haley v. Ohio, supra*, 599) will demonstrate conclusively, from the undisputed evidence, that force or coercion, or both, were used to exact the confession and prior and subsequent oral statements of petitioner. In the face of the bruises appearing on the body of petitioner on the morning of June 9, bruises which were not present at the time of his arrest on June 6, how can it possibly be said that petitioner was not beaten during the period of his illegal detention in the Hawthorne Barracks?

Putting to one side the controverted evidence, and taking only the undisputed testimony, we have the following sequence of events. At 2 A.M. on June 6, 1950 petitioner was arrested at the home of his brother (Rec.,

1958). Before being taken from the apartment, he washed up, while clad in his underwear (Rec., 1986). At that time Trooper Gowley observed nothing abnormal about petitioner's exposed arms (Rec., 1987). From that moment he was continuously in the custody of the State Police until about midnight June 8, when he was lodged by them in the County Jail (Rec., 1273). Early the next morning he was examined by the jail physician, that afternoon by a lawyer for whom he had sent. Both these witnesses were in agreement as to the multiple bruises found in the area of the left arm of petitioner, between the elbow and the shoulder (page 13, *ante*). The attorney's examination, a more thorough one, we submit, disclosed numerous other bruises on various parts of petitioner's body (Rec., 1840-1).

If this undisputed evidence, this panorama of events does not at least "suggest that force or coercion was used to exact the confession" (*Haley v. Ohio*, *supra*, 599; italics ours), then we respectfully submit that the term has lost its meaning.

Any remaining doubt as to the measures visited upon petitioner by the State Police is dispelled, beyond possibility of refutation, by the undisputed fact of the injuries appearing on the bodies of *all three petitioners* almost immediately after their release from the custody of the State Police. This proof of physical injury, so tellingly portrayed even by the admittedly incomplete recorded entries of a county official who was definitely a hostile witness, leads to but one inevitable conclusion, *e.g.* that the confession of petitioner was "coercion's product", as was the confession of petitioner Cooper, their failure to testify notwithstanding.

It is inconceivable that this Court would hold that unless a defendant testifies it is futile to introduce proof of

police violence of the character introduced in the case at bar.

The duty of the prosecution "satisfactorily to account" (*People v. Valletutti, supra*, 230) for these injuries was not conditional upon the petitioners having first testified. In token acknowledgment of the rule, the prosecution did undertake to explain the manner in which the injuries were sustained; albeit in a manner which hardly merits serious consideration, e.g. on the theory of self-infliction.

As for the explanation offered, we point to one undisputed fact which disposes, with devastating finality, of the prosecution's whole specious attempt to account for the injuries received by the confessing petitioners, Cooper and Stein. Wissner, the non-confessing petitioner, bore the most aggravated injuries, among them two fractured ribs. He had no confession to explain away, and yet the prosecution argued before the jury and the appellate Court below that he inflicted these injuries upon himself, while Cooper and Stein, in distantly separated parts of the County Jail, were performing similar rites of self-flagellation. The utter absurdity of the theory is rendered self-evident by the nature of the injuries, injuries which appeared all over the petitioners' bodies, even on such portions of the body as the buttocks (Rec., 3012; 2971).

Upon the hypothesis advanced by the prosecution, one would have to be so credulous as to believe that petitioner Wissner, with no confession to "self-inflict away", immediately after arraignment deliberately set about to and did break his own ribs, abrade his shins, and bruise his thighs, abdomen, head and buttocks, while alone in a prison cell. The mere statement of the theory of self-infliction in this case is enough to demonstrate its shallowness and unreality.

It is only fair to add, in connection with the injuries sustained by petitioner, that both Captain Glasheen and Sergeant Barber testified that not a hand was laid on him (Rec., 1914; 1931-2; 1149; 2083), but it is also true that charges of police brutality, even where supported, as in the case of petitioners, by incontrovertible proof, inevitably evoke denials by the police, denials which have become a shopworn stereotype.

"As is usual in this type of case the deputies say that the confession was wholly 'voluntary'; * * *"
(Mr. Justice BLACK, dissenting, in *Gallegos v. Nebraska*, 342 U. S. 55, 74).

It would be the height of naivete to expect these officers to admit under oath to the commission by them of a serious crime. Certainly the members of this Court are not, like so many cloistered academies, so removed from everyday reality as to expect petitioner to prove acts of police brutality *out of the mouths of the very perpetrators of such acts*. In the light of the undisputed proof of physical injury to all three petitioners, their denials are meaningless.

Despite the finding of the jury and the appellate Court below, resolving against petitioner the question of force or coercion in connection with the manner in which his confession and prior and subsequent oral statements were obtained, we submit that this Court is not bound thereby, but is, rather, under the solemn duty of making an independent investigation to determine the facts for itself.

It is, of course, petitioner's contention here, as it was upon the trial and upon appeal to the Court below, that the confession and prior and subsequent oral statements of petitioner should have been ruled invalid by the trial Court, *as a matter of law*, and the matter of their voluntariness not submitted to the jury as a question of fact.

Even as a question of fact, however, the matter of their voluntariness was never submitted to the jury "under proper instructions" (*Gallegos v. Nebraska, supra*, 58). Not a single reference was made by the Court, in its charge, to the testimony of any of the four witnesses called by petitioner upon the preliminary examination.

In *Ward v. Texas*, 316 U. S. 547, 550, the Court said:

"Each State has the right to prescribe the tests governing the admissibility of a confession. In various States there may be various tests. But when, as in this case, the question is properly raised as to whether a defendant has been denied due process of law guaranteed by the Federal Constitution, we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission amounts to a denial of due process."

In *Ashcraft v. Tennessee, supra*, 145, speaking of the duty of the Supreme Court to make an independent examination to determine whether a confession was voluntary, the Court said:

"Our duty to make that examination could not have been foreclosed by the finding of a court, or the verdict of a jury or both."

In *Lisenba v. California*, 314 U. S. 219, 240, it is said:

"* * * we think it right to add that when a prisoner held ~~incommunicado~~ is subjected to questioning by officers for long periods and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by use of his confession, he is deprived of his liberty or life through tyrannical or oppressive means".

In the instant case every device condemned by this Court as obnoxious to the Constitution was employed to

obtain petitioner's confession. Summarized, they are: Failure to book petitioner in any station house; spiriting him away, in the dead of night, to an undisclosed destination, where counsel could not reach him; failure to advise counsel whose assistance petitioner had sought, amounting to a denial of the right of counsel; repeated questioning, day and night, with lack of sleep, if not of food; holding *incommunicado* from 2 A.M. June 6 to 10 P.M. June 8; the beating of petitioner, as evidenced by petitioner's physical condition on the morning of June 9. In addition, we have the complete lack of any explanation, on the part of the prosecution, for the injuries found on the bodies of all three petitioners, other than fantastic conjecture which taxes the credulity of any but the most gullible. What more could be done, or must be done, we respectfully ask, to establish that a confession is involuntary?

The Inexcusable Delay in Arraignment.

It was conceded that the arraignment of all three petitioners was wilfully and wrongfully delayed, in violation of the statutes (Section 165 Code of Criminal Procedure of New York State; Section 1844 Penal Law). The trial Court eventually so determined as a matter of law, as an afterthought at the end of its charge, although in the body of the charge the Court had first erroneously left it as a question of fact for the jury.

Section 165 of the New York Code of Criminal Procedure, requiring a defendant to be taken before a magistrate without unnecessary delay, and Section 1844 of the Penal Law, making the failure of the arresting officer so to do a misdemeanor, are set forth in Appendices C and D.

Although no time is stated either in Section 165 of the Code of Criminal Procedure or Section 1844 of the Penal

Law, it is nevertheless implicit in such statutes that the arresting officer must act promptly and without unnecessary delay (*McNabb v. United States, infra*).

A somewhat similar statute governs federal procedure*.

There may be situations where delay is unavoidable, i. e. inability to locate a magistrate, or illness of the prisoner. As heretofore pointed out in the petition (page 12, *ante*), a magistrate was available during every hour of the 68 hours of illegal detention (Rec., 1270).

Were this a case arising in the federal courts there could be no doubt that the confession and prior and subsequent oral statements of petitioner could not stand against the rule of *McNabb v. United States*, 319 U. S. 322, which forbids inexcusable detention for the purpose of extracting evidence from an accused, irrespective of actual coercion, and condemns "easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection" (page 344). Yet, since *McNabb*, in cases arising from state courts under the Fourteenth Amendment, *Ashcraft v. Tennessee, supra*, and *Malinski v. New York, supra***, this Court has set aside convictions obtained by the use of confessions extracted after prolonged detention, coupled with intensive interrogation.

It is true that in *Malinski* there was the additional element of coercion in the form of threats of violence. Though the petitioner there claimed that there was, in fact, actual violence, this Court attached no weight to the claim:

* Vide Appendix F (Federal Rules of Criminal Procedure: Rule 5).

** In *Ashcraft*, the accused was detained by the police for 36 hours before being granted a preliminary hearing. In *Malinski* a confession obtained after ten hours' detention was ruled invalid.

"He said he was beaten; but that was disputed. And the assertion has such a dubious claim to veracity that we lay it aside" (page 403).

Also, at page 403:

"There was no visible sign of any beating such as bruises or scars".

In both cases there was proof of illegal detention, plus the usual concomitant of continuous questioning, and, in the case of *Malinski*, the added element of admitted threats, *but without proof of physical mistreatment*, i.e. bruises appearing on the petitioners' bodies.

While the record in *Turner v. Pennsylvania, supra*, discloses that petitioner there made some claim of being hit with a chair, and in *Harris v. South Carolina, supra*, petitioner claimed to have been slapped by an officer, in neither case did this Court, in setting aside convictions based upon confessions obtained after prolonged detention and intensive questioning, refer to such claims or in any way base its decision thereon.

Even apart from the elements of physical injury and continuous interrogation, both here present, there is certainly considerable support for the belief that the right to a prompt preliminary hearing is such an "impressively pervasive requirement of criminal procedure" (*McNabb v. United States, supra*, 343) that it must be considered among "the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'" (*Herbert v. Louisiana*, 272 U. S. 312, 316).

Even if such a conclusion would seem to extend the implications of this Court's decisions and "the effect of a mere denial of a prompt examining trial is a matter of state, not of federal law" (*Lyons v. Oklahoma, supra*, 597

n. 2), still it is clear that the fact of prolonged detention will be considered as affecting the voluntary nature of a confession (*Lyons v. Oklahoma, supra*; *Haley v. Ohio, supra*).

In the case at bar, at any rate, we have not only those determining factors which were present in *Watts v. Indiana, supra*; *Ashcraft v. Tennessee, supra*; *Turner v. Pennsylvania, supra*, and *Harris v. South Carolina, supra*, e.g. the many hours of intensive interrogation, plus the illegal detention; but, *in addition*, that which was not present in any of the cases cited—*undisputed and indisputable proof of injuries sustained by all three petitioners*. This one factor, absent from *Ashcraft* and its companions, demands their application on an *a fortiori* basis.

Mr. Justice JACKSON, in concurring in the result in the *Watts* case, *supra*, stated (pages 59-60):

“Of course, no confession that has been obtained by any form of physical violence to the person is reliable and hence no conviction should rest upon one obtained in that manner. Such treatment not only breaks the will to conceal or lie, but may even break the will to stand by the truth. Nor is it questioned that the same result can sometimes be achieved by threats, promises, or inducements, which torture the mind but put no scar on the body”.

In dissent, in *Ashcraft v. Tennessee, supra*, the same Justice said (page 160):

“Interrogation per se is not, *while violence per se is, an outlaw*”. (Italics ours).

We are not unmindful that the mere fact that a confession was made while in the custody of the police does not render it inadmissible (*McNabb v. United States, supra*, 346). It is, however, a circumstance to be considered, as

is the fact of an extended delay in arraignment, the holding of a prisoner incommunicado, without opportunity to see counsel or friends (*Ward v. Texas, supra*; *Malinski v. New York, supra*), and subjecting him to long and gruelling questioning (*Ward v. Texas, supra*; *Watts v. Indiana, supra*). All of these elements are here present, with the additional undisputed one of physical injuries.

Petitioner's Subsequent Oral Statements.

Subsequent to the written confession, there were supposedly five oral statements or incriminating acts of petitioner (pages 10, 11, *ante*). These statements and acts, we submit, are entitled to no greater consideration than the written confession or the prior oral statement, for they suffered from the same infirmities which rendered the others invalid.

Petitioner, at the time of these subsequent statements and acts, was still in the custody of the State Police; he was still without the aid of counsel whom he had sought from the moment of his arrest; he was still without the solace of relatives or friends, and was still suffering from injuries already inflicted by the State Police.

The principle we here invoke is that stated by this Court in *Malinski v. New York, supra*, 428:

“A man once broken in will does not readily, if ever, recover from the breaking”.

Also, at pages 425-6:

“No one else except his imprisoners was allowed to see him at any time.”

Also, at page 429:

“* * * a series of confessions, of which the first is the creative precursor of the later ones”.

Even if the later statements or acts were lawfully obtained, the prior confession or statement having once "infected the trial, the verdict of guilty must be set aside no matter how free of taint the other evidence may be" (*Stroble v. California, supra*; *Malinski v. New York, supra*, 433).

Controlling Decisions.

Decisions which support petitioner's contentions and justify the granting of the writ sought are:

- Ashcraft v. Tennessee*, 322 U. S. 143;
- Brown v. Mississippi*, 297 U. S. 278;
- Carignan v. United States*, 342 U. S. 36;
- Chambers v. Florida*, 309 U. S. 227;
- Gallegos v. Nebraska*, 342 U. S. 55;
- Haley v. Ohio*, 332 U. S. 596;
- Harris v. South Carolina*, 338 U. S. 68;
- Lisenba v. California*, 314 U. S. 219;
- Lyons v. Oklahoma*, 322 U. S. 596;
- Malinski v. New York*, 324 U. S. 401;
- McNabb v. United States*, 318 U. S. 322;
- Stroble v. California*, 343 U. S. ;
- Turner v. Pennsylvania*, 338 U. S. 62;
- Ward v. Texas*, 316 U. S. 547;
- Watts v. Indiana*, 338 U. S. 49.

CONCLUSION

The conceded and ~~proven~~ facts in the instant case, hereinbefore specifically set forth, disclose a situation more flagrant and indefensible than was shown in any of the cases cited in this petition and brief. No novel rule is asserted by petitioner. His rights under the Constitution have been unlawfully invaded. He invokes its protecting ægis that his life may not be forfeit by the use of a confession and

prior and subsequent oral statements obtained under circumstances violative of the due process clause of the Fourteenth Amendment of the Constitution.

So conclusively apparent does the record disclose an invasion of petitioner's rights under the Fourteenth Amendment that the intervention by this Court, to prevent a gross miscarriage of justice and the execution of petitioner as a result of practices condemned by it, is imperative.

Petitioner's position upon this application is best stated in the language of this Court in *Chambers v. Florida*, *supra*, 240:

"To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol".

We respectfully pray that the petition for certiorari be granted.

Respectfully submitted,

• PHILIP J. O'BRIEN,
JOHN J. DUFF,
PHILIP J. O'BRIEN, JR.
Counsel for Petitioner.

[APPENDICES FOLLOW]

Appendix A

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix B

JUDICIAL CODE OF THE UNITED STATES, SECTION 1257 (c), AS AMENDED BY THE ACT OF JUNE 25, 1948.

It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this

paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

Appendix C

Code of Criminal Procedure

SECTION 165 OF THE ~~_____~~ OF THE STATE OF NEW YORK.

The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night.

Appendix D

SECTION 1844 OF THE PENAL LAW OF THE STATE OF NEW YORK

A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

Appendix E

SECTION 399 OF THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK

A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

Appendix F

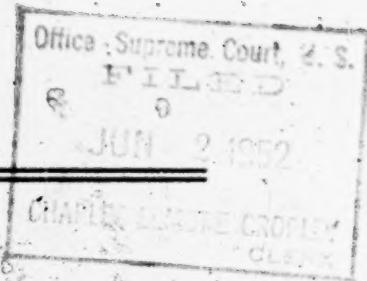
Federal Rules of Criminal Procedure:

“Rule 5. Proceedings before the Commissioner.

“(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

“(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.”

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SUPREME COURT: U.S.



IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. ~~393~~ MISC.

~~393~~ 392

NATHAN WISSNER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COUNTY COURT OF WESTCHESTER COUNTY,
STATE OF NEW YORK, AND BRIEF IN SUPPORT
THEREOF

I. MAURICE WORMSER,
J. BERTRAM WEGMAN,
RICHARD J. BURKE,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States
OCTOBER TERM 1951

NATHAN WISSNER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COUNTY COURT OF WESTCHESTER COUNTY,
STATE OF NEW YORK**

*To the Honorable, the Chief Justice of the United States,
and Associate Justices of the Supreme Court of the
United States:*

Your petitioner respectfully represents:

A

Summary Statement of Matter Involved

On December 21, 1950, your petitioner, together with Calman Cooper and Harry A. Stein, was convicted of murder in the first degree, after a joint trial, by the County Court of Westchester County, State of New York, and was sentenced to death. The conviction was for a homicide committed "without a design to effect death by a person engaged in the commission of a felony" (N. Y. Penal Law, Section 1044, subd. 2, set forth in the appendix to the accompanying brief). On appeal to the New York Court of Appeals the judgment was affirmed without opinion, on March 6, 1952. •

The facts may be briefly stated as follows:

On April 3, 1950, at about 3 P. M., four persons held up a Ford truck, owned by the Reader's Digest Association, on a private roadway leading from the Reader's Digest plant at Chappaqua, New York. The truck was being driven by William Waterbury who was accompanied by a guard, Andrew Petrini. A single shot fired by one of the robbers standing on the roadway passed through the window glass of the door of the truck and caused Petrini's death.

The perpetrators of the crime escaped unapprehended, with three bags containing checks and currency, the property of the Reader's Digest Association.

Just over two months later, in the early morning of June 5, 1950, Calman Cooper, in the company of his elderly father, was arrested on the street in New York City; both were taken to the State Police Barracks at Hawthorne, New York. There Cooper was held, clothed and handcuffed continuously, in an office room, incommunicado, for four days until his arraignment on the night of June 8th. In the meantime he was interrogated by State Police officers working in relays, according to their testimony (R. 1312-1313, 1317, 1361, 1403-1404, 2072, 2087, 2103)* on June 5th and June 6th for a total of twenty hours. At 10:45 P. M. on June 6th he commenced to confess, and signed a type-written question and answer statement at 2 A. M. on the morning of June 7th. During this time his father, as well as his brother, who had also been arrested on June 5th, were confined and likewise held incommunicado by the State Police at the barracks.

Harry A. Stein was arrested in New York City at 2 A. M. on June 6th, 1950. He too was taken to the State Police Barracks at Hawthorne and there held, clothed and handcuffed continuously, in a locker room, incommunicado, until his arraignment on the night of June 8th. He was arrested

* References thus are, unless otherwise indicated, to the pages of the Record.

at the apartment of his brother, who communicated with an attorney on his behalf in the early morning of June 6th, but the attorney, despite repeated and vigorous efforts, was unable to locate Stein until after the arraignment. Stein was interrogated by the State Police officers working in relays, according to their testimony (R. 1905-1909, 1925-1926, 1931) on June 6th and June 7th for fifteen hours. He commenced to confess around 10 A. M. on June 7th and about 4:30 P. M. on that day signed a typewritten question and answer statement.

Your petitioner Wissner was arrested on June 7th at about 9 A. M. in New York City and carried off to the same barracks at Hawthorne. He, too, was interrogated, but he made no confession. Instead he steadfastly maintained his innocence (R. 2030, 2245). He, too, was held incommunicado until the night of June 8th before being arraigned. His wife was arrested with him and taken to the same State Police Barracks. On June 8th, as a condition of her liberation from confinement there, the police required her to execute a release absolving the State Police Sergeant from liability (Ex. S, printed R. 2960, offered R. 2255).

The District Attorney of Westchester County testified that he became aware on the afternoon of June 6th that Cooper had been in custody since the morning of June 5th. Cooper, however, had not yet confessed at that time, nor had Stein who was also in custody, and all three defendants were held incarcerated without being arraigned before a Magistrate until 10 P. M. on June 8th, 1950. The charge against them at the arraignment was made in the form of an affidavit "upon information and belief" by the State Police Sergeant, the grounds of said information and belief being stated to be the aforesaid confession of Calman Cooper (Ex. 60 for id., printed R. 2891-2892, marked R. 1271).

The Trial Court ruled as a matter of law that the delay in arraignment of the three defendants was unnecessary and hence illegal, being in violation of state statutes (Sec.

1844, N. Y. Penal Law; Sec. 165, N. Y. Code Crim. Proc., set forth in the appendix to the accompanying brief).

Immediately after the arraignment all three were lodged in the County jail, where they were held each in solitary confinement, in widely separated cells.

Early on the following morning (June 9th) they were separately examined by the prison physician.

On Cooper he found bruises on the left side of the chest, also on the abdomen, also in the right bicep area, and also on both buttocks.

On Stein the physician found bruises in the left bicep area (so he reported, at least). An attorney who examined Stein the same day observed bruises on both arms and on the area below the left breast.

On your petitioner Wissner, who had made no confession, the prison physician observed the most extensive injuries: there were bruises on the left side of the chest; the fifth rib on the left side was broken; there were also abrasions of both shins, bruised areas on the thighs, the left side of the abdomen, and the buttocks; and there was a bump on the head.

Objection was made by all the defendants to the admission in evidence of the Cooper and Stein confessions as having been obtained by unconstitutional means (R. 1381, 1275-1280, 1967, 1900, 1583). The prosecution denied that physical brutality had been employed, but presented no testimony to explain how all three defendants in the same case had simultaneously acquired such injuries. The police witnesses themselves established however—so that it cannot be disputed—that the confessions were obtained after prolonged intensive questioning by relays of questioners during an extended illegal delay of arraignment while the prisoners were held incommunicado without access to family, friend or counsel, or notice of their rights.

Your petitioner further objected to their admission to evidence, no matter how obtained, in a trial in which he was one of the defendants; on the ground that he would be so unalterably prejudiced by them, despite any instruction from the Court that it would become impossible for

him to have a fair trial, and asked a severance of his case from the others. The objections overruled and the severance denied, he importuned the deletion of his name from the confessions; that, too, was refused.

The gist of the confessions obtained from Cooper and Stein was that they had committed the crime together with your petitioner Wissner, and with one Dorfman, who was Wissner's partner in an auto renting business on New York's lower East Side.

Dorfman, accompanied by an attorney, surrendered to the District Attorney on June 19, 1950, after he had taken the precaution of having his body photographed and examined by a physician prior to surrendering. Subsequently, after his wife had been imprisoned, he became a witness for the prosecution; his case was severed from that of the other defendants at the beginning of the trial, and it does not appear that any disposition was made of the indictment as against him.

This accomplice witness, Dorfman, furnished the main testimony against your petitioner, and placed him at the scene of the crime. As to numerous details, however, his testimony was hopelessly inconsistent with that of other witnesses called by the prosecution, as well as with the confessions of Cooper and Stein. The Reader's Digest truckdriver, Waterbury, identified your petitioner, whom he claimed to have seen for only a couple of seconds, and testified that your petitioner was, at the time, wearing a felt hat, the frames of a pair of spectacles without any glass in them and with a large false nose suspended from the frames. This witness had made a statement to the District Attorney one hour after the hold-up however, which was stenographically recorded, in which he made no mention whatever of *any* of these striking and bizarre details; in which he was able to describe only one of the robbers as "a heavy set fellow who wore glasses", and in which he averred that the robbers had worn "no masks".

There was no other testimony offered that connected your petitioner with the commission of the crime; how-

ever, two other prosecution witnesses were called, one to testify (in contradiction of Dorfman) that he had seen your petitioner, together with his partner Dorfman, at their place of business in New York City, some forty miles from the scene of the crime, together with the other defendants, on the morning of April 3, 1950; and another, Mrs. Dorfman, to testify that she saw them together at her home in Brooklyn, New York, on the evening of that day.

Your petitioner moved in advance of the trial for a severance and a separate trial, alleging that it would be impossible for him to obtain a fair trial—he not having confessed—if he were tried jointly with two other defendants who had made confessions implicating him (R. 38-40). This motion was denied.

At the outset of the trial after the District Attorney's opening statement (R. 158-159), also when each of the confessions was offered in evidence (R. 1519, 1967-1968), also when the contents of each confession were being considered by the Court, and at numerous other appropriate times during the trial (R. 1451, 1455-1457, 1900, 1995, 2277-2278, 2529), your petitioner reiterated his application for a severance and a separate trial, stating that he was being deprived of the right to confront the witnesses against him (R. 1900, 2529, 2277-2278).

Since all of these motions were denied, he urgently implored the Trial Court *at least* to delete his name from these confessions in order to minimize the inevitable prejudice to him from their introduction in evidence (R. 1502, 1503, 1504, 1505-1514, 1888, 1890, 1891, 1893), reiterating that he could not confront the witnesses (R. 1897). His name was mentioned *eighty-eight times* in the confessions, together with the most detailed and prejudicial accusations against him. Nevertheless, this minimal safeguard of his rights was summarily refused.

Having summarily denied even such minimal safeguard against prejudice, the Trial Judge in summarizing the confessions in his charge to the jury, himself gave minutely

detailed prominence to the accusations against your petitioner contained therein. Further reference to this anomaly is made, with pertinent excerpts, in the brief, *infra*, pp. 21-22.

It is true that the Trial Court gave lip service to your petitioner's rights at a point in its charge separated by fourteen pages from this discussion of the contents of the confessions, by a perfunctory statement that the confessions were only to be considered against those making them.

The District Attorney in his summation to the jury also read inflammatory extracts from each of the confessions, similarly selecting only portions thereof dealing with your petitioner.

The combination of the denial of severance, refusal to delete petitioner's name from the confessions, and use made against him of the confessions, was also urged in petitioner's brief and argument in the New York Court of Appeals as a denial of due process.

B

Jurisdictional Statement

The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 1257, and Rule 38 of the Rules of the Supreme Court of the United States.

The judgment of the Court of Appeals of the State of New York, affirming the judgment of conviction had in the County Court of Westchester County, was rendered March 6, 1952. The remittitur of the Court of Appeals was amended by order of that Court dated April 18, 1952, to add the following:

"Questions under the Federal Constitution were presented and necessarily passed upon by this Court, viz: * * * (3) whether the admission in evidence of the confessions of the defendants Cooper and Stein violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the

United States; (4) whether the refusal to sever the trial of the defendant Wissner from that of the defendants Cooper and Stein violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the United States; (5) whether the refusal of the trial judge to delete from the confessions of defendants Cooper and Stein all references therein made to the defendant Wissner as a participant in the crime violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the United States. This Court held that the rights of the defendants under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied."

C

The Questions Presented Are:

1. Whether at a joint trial for murder in a State Court, resulting in the death sentence, of two defendants who have confessed, and one non-confessing defendant, where a separate trial is denied, the persistent refusal of the Trial Court to delete the name of the non-confessing defendant, from the confessions of the two co-defendants, who did not testify, wherein eighty-eight times he is named as a participant, violates the non-confessing defendant's right to due process as commanded by the Fourteenth Amendment.
2. Whether at a joint trial of two defendants who have confessed and one non-confessing defendant, the admission into evidence of the two confessions without deletion therefrom of the eighty-eight times repeated name of the non-confessing defendant, which confessions were concededly obtained after prolonged questioning, by police working in relays, of the defendants while held incommunicado during a delay in arraignment found by the State Court to be illegal, an issue existing as to whether the defendants were beaten, violates the non-confessing defendant's constitutional right to due process.

D

The Reasons Relied Upon for the Allowance of the Writ

The New York Court of Appeals in affirming petitioner's conviction of murder, and the imposition of the death sentence, has necessarily decided, as it certified in its amended remittitur, a federal constitutional question of substance not heretofore determined by this Court, viz., that a non-confessing defendant's right to due process is not invaded by the persistent refusal of the Judge presiding at a joint trial, a separate trial having been denied, to protect him by deleting his name therefrom when allowing in evidence the confessions of his two co-defendants, who did not testify, although such requested deletion would not in the least have affected the coherency of the confessions. The Court of Appeals has also decided another federal constitutional question in a way "probably not in accord with applicable decisions of this Court" (Rules of the Supreme Court, No. 38) in determining that petitioner's right to due process was not impaired by the introduction to evidence of the confessions of his co-defendants, although those confessions had been obtained by prolonged interrogation by police working in relays from persons illegally detained incommunicado, under circumstances most strongly suggestive of the use of physical brutality and clearly demonstrating other coercive methods.

The failure of the Court of Appeals to write an opinion concerning such questions presented, as it certified, in a case involving three death sentencees, at least suggests some doubt whether any rationally convincing justification for its decision could be expounded ~~which~~ would accord with the pronouncements of this Court in correcting prior misconceptions by that Court of the nature and extent of the right to due process guaranteed by the Constitution.

For such light as it may shed on the undisclosed rationale of the Court of Appeals' decision, it may be noted that the District Attorney argued in his brief in that Court that the police procedures heretofore condemned by this Court were nevertheless necessary and therefore venial adjuncts to crime detection.

This being the attitude of the County prosecutor—quite similar to the attitude of the prosecutor which was condemned in *Malinski v. New York*, 324 U. S. 401, 406 (footnote 3), 407, 417-418, 421—it is not surprising, albeit shocking, to learn from the record in this case that the attorney for a co-defendant who later became the State's witness thought it necessary before surrendering him to the custody of this District Attorney to have his client's body photographed and examined by a physician. To expect protection against police abuse from a State prosecutor so minded would be fatuous. As the then Chief Judge of the New York Court of Appeals wrote in his dissenting opinion in *People v. Malinski*, 292 N. Y. 360, 386:

"We cannot close our eyes to the fact that our frequently and solemnly repeated admonitions to law enforcement officers that they are not above the law and may not in their zeal to obtain convictions hold, without arraignment, persons suspected of crime in order to have opportunity to obtain confessions, are often unheeded."

Such admonitions may be expected to continue unheeded, so long as cases such as the present one are affirmed without comment or corrective action by State Courts of review.

It is in this setting that your petitioner raises the question which was left open in *Turner v. Pennsylvania*, 338 U. S. 62, 65-66, i.e., "whether under the Fourteenth Amendment a coerced statement may be excluded on objection of one not coerced into making it", and which could be avoided, by reason of the particular circumstances present in those cases, in *Ashcraft v. Tennessee*, 322 U. S. 143, and *Malinski v. New York*, *supra*, by remission of the problem to the State Courts of review.

But apart from the methods by which the confessions were obtained, and assuming them *arguendo* admissible, a grave question of due process remains. If the State Court denies a separate trial to a non-confessing defendant named eighty-eight times by two confessing co-defendants in their confessions, does not the very essence of due process require, to preserve in actuality the defendant's right to confrontation and cross-examination, that he be protected from any glaringly unfair results of such a ruling by something more than dry formalism? If the State Court, as in this case, then persistently refuses—without any possible reason—to delete his name from the confessions, and these references to him by name are emphasized to the jury by the Court and the prosecutor, it is submitted that any sober sense of justice is offended by a procedure which affects at one and the same time to retain the semblance of fairness, while actually achieving the efficient results of unfairness.

WHEREFORE, your petitioner, NATHAN WISSNER, prays that a writ of certiorari may issue out of and under the seal of this Court to the County Court of Westchester County, State of New York, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the Court of Appeals of the State of New York affirming the judgment in this cause may be reversed, and that petitioner may have such other relief as this Court may deem appropriate.

Dated: May 23, 1952.

NATHAN WISSNER, Petitioner,

By: I. MAURICE WORMSER,

J. BERTRAM WEGMAN,

RICHARD J. BURKE,

Counsel for Petitioner.

IN THE
Supreme Court of the United States
OCTOBER TERM 1951

NATHAN WISSNER,
Petitioner,
against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI**

Opinion Below

The Court of Appeals of New York affirmed without opinion the conviction and the death sentence imposed upon petitioner.

Jurisdiction

The statement under which the jurisdiction of this Court is invoked, as well as the statement of the questions presented, and the factual matter relevant to this application appear in the petition to which this brief is annexed.

Specification of Errors Assigned

The County Court of Westchester County, State of New York, committed the following errors requiring the reversal of the judgment of conviction:

1. The Court erred in admitting to evidence the confessions of petitioner's co-defendants Cooper and Stein by

reason of the totality of coercive circumstances under which they were obtained.

2. The Court erred in the following aggregate of rulings: (A) the denial to petitioner of a separate trial uninfected by the admission to evidence of the confessions of his co-defendants Cooper and Stein; (B) the persistent refusal to delete petitioner's name, eighty-eight times repeated, from those confessions; (C) the use made in the District Attorney's summation and the Court's charge to the jury of portions of those confessions incriminating petitioner.

POINT I

The admission of the coerced confessions of the other two defendants deprived petitioner of his right to due process guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The facts have been adverted to in the petition.

At the trial, testimony was taken in the presence of the jury on the issue of the voluntariness of the confessions of Cooper and Stein, before they were admitted to evidence.* No proof was offered by the prosecution to explain the extensive bruises, contusions and other indicia of injury found by the prison physician spread over all three defendants' bodies the morning after the night of their arraignment, even on such portions of the body as the buttocks, or to show that they were not caused by the blows of policemen. In his closing argument to the jury, the prose-

* The defendants themselves did not take the stand. An unsuccessful effort had been made by Stein, in a different court, prior to the trial, to secure a judicial hearing out of the presence of the trial jury of the circumstances under which his confession was obtained. That application was supported by Stein's affidavit relating the horrifying details of the beatings and torture to which he was subjected—those papers being marked Exhibit U for Identification (R. 1843).

cutor's comment thereon was that these injuries "could have been self-inflicted". This cannot constitute a satisfactory accounting, except to the most credulous, considering that each prisoner admittedly was held in solitary confinement without opportunity for consultation. Also, upon this hypothesis, one has to assume that Wissner, who had made no confession to be explained away, immediately after arraignment broke his own rib, abraded his shins, and bruised his thighs, his abdomen, his head and his buttocks!

The Trial Court ruled that there was an issue of fact as to coercion to be determined by the jury, and hence admitted the confessions to evidence.

It is not possible to determine how the jury resolved this issue, inasmuch as the Trial Court declined to instruct the jury to acquit if they found the confessions to be involuntary (R. 2779, 2782). Instead, they were instructed, in that event, to reject the confessions in considering the evidence (R. 2767, 2769); and the District Attorney argued to them that there was sufficient evidence without the confessions. He made the same argument when the case was reviewed in the New York Court of Appeals. Since that Court wrote no opinion, there again can be no assurance that that Court considered the confessions to be voluntary; its certification in the amended remittitur that it had necessarily passed upon the question whether the admission of the confessions violated the defendants' rights under the Fourteenth Amendment to the Constitution of the United States, without further explanation, does not disclose whether it adopted the argument of the District Attorney in that respect (although such a basis for decision would have been clear error), or whether it adopted his other argument that efficient police work requires illegal detention incommunicado, and prolonged interrogation.

If the admission of the confessions denied a constitutional right to the defendants, the error would require reversal, regardless of whether the other evidence in the record was sufficient to justify the general verdict of guilty. *Lyons v. Oklahoma*, 322 U.S. 596, 597; footnote 1, *Malinski*

v. *New York*, 324 U. S. 401, 404. But since this now well-established principle was rejected and disregarded quite recently by the Supreme Court of California, as this Court noted in *Stroble v. California*, 96 L. ed: (Adv. Op.) 529 (decided April 7, 1952), there can be no assurance that the same error has not occurred in New York, which had not regarded sympathetically the exclusion of confessions because obtained by coercion, *People v. Malinski*, 292 N. Y. 360.

Even if one were to accept the disingenuous testimony of the police that the defendants were not beaten, the facts admitted by the prosecution witnesses rendered the admission of the confessions a denial of due process of law as expounded in *Watts v. Indiana*, 338 U. S. 49; *Turner v. Pennsylvania*, 338 U. S. 62; and *Harris v. South Carolina*, 338 U. S. 68. In his brief in the New York Court of Appeals, the District Attorney made the thinly-veiled argument that such precedents might safely be disregarded since two of them were decided by a closely divided court. But counsel do not understand that this Court has ever departed from the propositions there laid down in a case where all the circumstances of the case required a similar disposition. Thus, in *Johnson v. Pennsylvania*, 340 U. S. 881, the petition for a writ of certiorari was granted and the conviction reversed without further hearing, upon the authority of *Turner v. Pennsylvania*, *supra*, with only two members of the Court dissenting. And as recently as April 7, 1952, this Court in *Stroble v. California*, *supra*, found occasion to mention with approval its condemnation of the "pressure of unrelenting interrogation" in *Watts v. Indiana*, *supra*.

The admission in evidence of a confession obtained during illegal detention incommunicado, following persistent police interrogation, by relays of questioners, for a prolonged period, without preliminary hearing or the least suggestion of elementary rights, and without opportunity to consult or communicate with family, friend, or counsel, results in a denial of due process of law—certainly at least

in a capital case where a serious issue exists whether, in addition, the defendants have been subjected to physical brutality. *Watts v. Indiana*, *Turner v. Pennsylvania*, *Harris v. South Carolina*, *supra*.

Here the arraignment of the three defendants was wilfully and wrongfully delayed, in violation of the statutes of the State (Sec. 1844, New York Penal Law; See. 165, New York Code of Criminal Procedure, set forth in the appendix), with the knowledge and clear acquiescence of the District Attorney himself. The trial court eventually so ruled as a matter of law, in a supplement to its charge (R. 2777, at bottom), although in the body of the charge in the context of its discussion of factors pertinent to a determination of voluntariness, the Court had first erroneously submitted this, too, as a question of fact for the jury.

That Cooper and Stein were submitted to prolonged interrogation by relays of questioners during this extended period of illegal detention, while held incommunicado, handcuffed at all times, under constant armed guard, was conceded by the prosecution witnesses. Even according to the police version, each of these defendants was questioned persistently on two different days, in the case of Cooper for twenty hours, and in the case of Stein for fifteen hours. It is safe to assume, considering the source of the testimony, that these estimates were not inflated.

These defendants were not advised of their right to counsel—or, for that matter, of any of their rights—and indeed in the case of Stein, persistent efforts over a period of three days by an attorney to locate Stein were unsuccessful—a circumstance which the Trial Court, it might be noted in passing, seemed to consider immaterial. Although these men had been arrested in New York City, where there was surely no lack of facilities, each was spirited away to an isolated State Police Barracks in Westchester County where there were no facilities at all for prisoners, and there secreted for days.

Nor were these defendants permitted to communicate with their family or friends. Cooper's elderly father, and

his brother, were also arrested and likewise held incommunicado without arraignment; the prosecution affirmatively proved that Cooper was driven to the resort of bargaining for their release, in exchange for which it is said he "offered" to confess. (A strikingly similar circumstance was described in *Harris v. South Carolina, supra*, as a part of the complex of police conduct which there was held a deprivation of due process.)

Concerning all of the foregoing circumstances there is no contravening testimony.

In *Malinski v. New York*, 324 U. S. 401, this Court, while reversing the conviction of Malinski whose confession had been improperly obtained, remanded the case of Malinski's co-defendant, Rudish, to the New York Court of Appeals for further consideration by that Court, in view of the decision as to the invalidity of Malinski's conviction. This Court, in declining to reverse as to Rudish, emphasized the effort which had been made to protect Rudish from the effect of Malinski's confession by the deletion of Rudish's name therefrom, a procedure said to have had "the complete approval of counsel for Rudish". Upon the remand, the New York Court of Appeals ruled (*People v. Rudish*, 294 N. Y. 500, 501):

"Nevertheless, since the Supreme Court of the United States directed a new trial as to Malinski because one of his confessions was inadmissible, the defendant Rudish should, in the interest of justice, receive a new trial with that confession excluded."

But in the case of your petitioner Wissner, not even a colorable effort was made to protect him from the effect of his co-defendants' confessions. Instead, the Trial Court insisted, despite the strongest protestations, that the name of Wissner, eighty-eight times repeated, remain and be submitted to the jury in the two confessions of the other defendants. Under the circumstances, if the constitutional rights of Cooper and Stein were violated by the admission of their confessions, only by the most sterile logic-chopping could it be said that Wissner's trial accorded him due

process. This question, however, though hypothetically propounded in this Court's opinion in *Turner v. Pennsylvania*, 338 U. S. 62, 65-66, has still to be answered here.

POINT II

The refusal to protect petitioner against the effect of the other two defendants' confessions by deleting his name therefrom, deprived him of due process.

It was apparent to the Trial Court as soon as the District Attorney had completed his opening to the jury, that the confessions of Stein and Cooper would be offered in evidence, and that Wissner was the only non-confessing defendant. Wissner's counsel in promptly moving for a separate trial, as he had done theretofore and did many times thereafter, then brought forcefully to the attention of the Court the incalculable prejudice that would inevitably result to Wissner if he were tried jointly with the other defendants.

The fact that there were two confessions—naming Wissner a total of eighty-eight times—that both of his co-defendants had confessed—did not merely double the prejudice reasonably to be expected. By no mathematical computation can it be determined how much more prejudice results from such a situation, since the effect upon the jury of each confession must be many times multiplied by the circumstance that each is psychologically supported and substantiated by the other confession. It put Wissner in a position where all three of the other persons named with him in the indictment would testify against him, but he would be confronted by and permitted to cross-examine only one of them.

If the denial of a separate trial could by any strained reasoning appear to be within the limits of discretion, then this was surely a case where it was necessary for prosecution and court to exercise a caution increasing in degree as the offenses dealt with increased in gravity, so as to

• avoid unfairness, assuming unfairness could be avoided under such circumstances. Instead, we find the Trial Court and District Attorney here managing the difficult problem of justice with which they were confronted in a manner which was bound to *insure* prejudice to Wissner from the joint trial.

Wissner's counsel strenuously entreated the Court to delete Wissner's name from the two confessions which were to be read to the jury. One would suppose that that was the least that ~~would~~ have been done. Such a procedural device was not unprecedented. *Maklinski v. New York*, 324 U. S. 401, 411. But here the Court repeatedly refused even this modicum of protection. Why did the Court insist, over repeated objection and exception, in a case of this grave nature, that the oft-repeated name of Wissner remain in the confessions? It is difficult to conjure up any legitimate explanation for these rulings; in his brief in the New York Court of Appeals the District Attorney was able to summarize the confessions without ever mentioning Wissner's name, and without detracting in the least from their coherency.

There followed occurrences shocking in character, which could not have been brought about had petitioner's reiterated requests for deletion of his name been granted.

The District Attorney, in his summation, read extracts from each of the confessions to the jury. The extract thus read verbatim from Stein's confession mentioned Wissner's name five times (R. 2698):

"By the time we came within five or ten feet of Wissner, stationed at the entrance to the Digest driveway, we had so slowed down our truck that the Digest truck had to stop. When both trucks stopped, Wissner swung into action on his side, while Pitt—that is Dorfman—and myself jumped out of our truck, ran to the Digest truck on the driver's side. While trying to clamber inside to the Digest truck, I heard a shot. I glanced up at the man who was sitting alongside the Digest truck driver and saw that he was bleeding about the face, and Wissner started climbing over him into the back of the truck."

There followed immediately two further mentions of Wissner (R. 2698). From Cooper's confession he read as follows (R. 2697):

"I made a turn onto Route 117, going south, and as I turned, I heard a shot. I stopped the truck about fifteen or twenty feet on Route 117 from the point of entrance to the Digest plant and looked back at the Digest truck and saw Wissner; * * *."

These were the *only* portions of the confessions of Cooper and Stein which the District Attorney elected to read verbatim to the jury during his summation—although of course the entire confessions had been read to the jury during the trial. It will be observed that both portions thus selected for emphasis convey the impression that it was the petitioner Wissner who shot Petrini.

Subsequently, the Trial Court, in charging the jury, summarized the confessions *in toto* giving minutely detailed prominence to all the accusations against Wissner contained therein. Curiously, the Court, like the District Attorney, took pains to *quote* verbatim from the confessions only a portion particularly harmful to Wissner, reading in part from Stein's confession (R. 2754):

"While trying to clamber inside the Digest truck, I heard a shot and I glanced up at the man who was seated alongside the Digest truck driver and saw that he was bleeding about the face, and that Wissner started climbing over him into the back of truck."

The Court's summary of Stein's confession continued:

"Stein further said that when they were tying up the driver of the Reader's Digest truck, he said, 'Please don't hurt me,' and Wissner remarked, 'Shut up, or you'll get what the other fellow got.'"

Surely the Trial Court must have recognized that only Wissner would be inculpated, and improperly so, by including the following in its summary to the jury of Cooper's confession (R. 2748):

"He said *** that on the way down, Wissner told the rest of them when he approached the truck, he had shown the gun and shouted to the driver to get out from behind the wheel and open the door. The driver started to attempt to drive the truck and Wissner therefore had to shoot him."

It will be noted that the portion of Cooper's confession to which the jury's attention was thus directed at the close of the case could have little or no probative value against Cooper.

This Court may have difficulty locating in the Trial Court's charge the protective instruction concerning Wissner that one might ordinarily expect to find coupled with a review of such evidence; it is necessary to search fourteen pages further along in the charge (R. 2769), in another portion thereof, for the instruction that the confessions were only to be considered against those making them. This instruction ostensibly was designed to erase from the jury's minds what had been so painstakingly implanted there; actually, it would seem to have been devised as a formal compliance with procedural requirements to protect against reversal.

As was stated in a different but similar context by Mr. Justice Jackson, concurring in *Krulewitch v. U. S.*, 336 U. S. 440, 453:

"The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. U. S.*, 332 U. S. 539, all practicing lawyers know to be unmitigated fiction."

The procedure petitioner cites as a denial of due process constitutes a cumulative complex—a consistent series of rulings mutually interdependent which in the aggregate produced the unfair result: first the judicial "discretion" is exercised to deny the non-confessing defendant a separate trial, although the circumstances dictate its advisability; then follows the adamant and deliberate refusal to expunge his name from the confessions of his co-

defendants, thus to protect him from the incident of the joint trial most certain to produce unfairness; as the final step, those very portions of the confessions are forcefully impressed upon the jury by both prosecutor and Court at the conclusion of the trial, just before the jury retires to deliberate.

Such procedure in the case at bar had the result to be expected—the petitioner's conviction. But it would be a mockery to say that it does not "offend those canons of decency and fairness which express the notions of justice of English speaking peoples" (*Rochin v. California*, 96 L. ed. [Adv. Op.] 157, quoting concurring opinion in *Malinski v. New York*, *supra*, 417). Those canons require more than the mere appearance of fairness regardless of the reality.

In *Snyder v. Massachusetts*, 291 U. S. 97, all members of the Court were in agreement that insofar as the right of confrontation entailed the privilege of cross-examining one's accusers, it was a part of the due process guaranteed by the Fourteenth Amendment, and the opinion states (at p. 107), in fact, that this is the real purpose of the privilege of confrontation as constitutionally protected:

"It was intended to prevent the conviction of the accused upon depositions or ex parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination."

The procedure now complained of in the case at bar is pregnant with essential unfairness for the very reason that it resulted in the conviction of the petitioner upon depositions, i.e., the confessions of Cooper and Stein, which so repeatedly inculpated the petitioner, without opportunity for cross-examination. Here the pale shadow of form has taken precedence over the substance of basic procedures distilled from centuries of experience as essential to the true administration of justice.

CONCLUSION

"Due Process of Law" is the keystone of the arch of our way of life. There are now as there have always been those who would prefer expediency. This Court has had to take corrective action time and again when the proper course needed to be pointed, when erroneous concepts required disapproval.

The invasion of due process of law—more accurately, the evasion thereof—disclosed by this case is the more insidious because it presents a series and sequence of subterfuges. The law was wantonly violated by the delay in arraignment until confessions had been extracted from two defendants who implicated a third from whom a confession could not be forced; *ergo* he was put on trial with the confessors so that their confessions would most improperly but quite effectively be used against him to eliminate the possibility of any fair appraisal by the jury of the feeble evidence otherwise available against him. It is to be hoped that the absence of an opinion below will not avoid the intervention of this Court to defend "Due Process of Law" because the violation thereof is in silence instead of forthright. The important, vital questions presented by this case cry out for answer.

The writ of certiorari should be granted.

Respectfully submitted,

I. MAURICE WORMSER,

J. BERTRAM WEGMAN,

RICHARD J. BURKE,

Counsel for Petitioners.

MYRON L. SHAPIRO,
of Counsel.

APPENDIX

Statutory provisions to which reference is made in the foregoing petition and brief:

Penal Law of New York, Sec. 1044:

“The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: ***

“2. *** without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise;”

Penal Law of New York, Sec. 1844:

“A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.”

Code of Criminal Procedure of New York, Sec. 165:

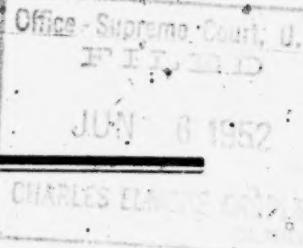
“The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night. As amended L. 1882, e. 360, Sec. 1; L. 1887, e. 694.”

Title 28, Sec. 1257, U. S. Code:

“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: ***

“(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.”

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~44-2418~~ 44-241893-7-352

CALMAN COO! ER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COUNTY COURT OF WESTCHESTER COUNTY, STATE
OF NEW YORK, AND BRIEF IN SUPPORT THEREOF**

PETER L. F. SABBATINO,
Counsel for Petitioner.

THOMAS J. TODARELLI,
DANIEL J. RIESNER,
of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No.

CALMAN COOPER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COUNTY COURT OF WESTCHESTER COUNTY,
STATE OF NEW YORK**

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED
STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

Your petitioner Calman Cooper respectfully represents
the following:

A.

Summary Statement of Matter Involved

The petitioner Calman Cooper, together with Harry A. Stein and Nathan Wissner, was convicted on December 21, 1950, of the crime of murder in the first degree, after trial before the Hon. Elbert T. Gallagher and a jury in the County Court, Westchester County, State of New York.*

* The jury deliberated almost ten hours (Rec., 98):

On December 27, 1950, all three were sentenced to be executed*. (Rec., 2800-2).**

The New York State Court of Appeals on March 6, 1952, unanimously affirmed, without opinion, the judgment of conviction.

Petitioner Cooper is now under sentence of death.

At the trial, the People were permitted to put into evidence a confession*** of petitioner Cooper, over his objection that such admission was in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution, an objection seasonably asserted at every stage of the trial, as well as on appeal before the Court of Appeals.****

B.

The Crime Charged

The indictment charged the crime of Murder in the First Degree, based upon felony murder,***** committed by Calman Cooper, Harry A. Stein and Nathan Wissner, as well as by Benny Dorfman, whose trial, on motion of the District Attorney, was severed, and who testified for the prosecution. (Rec., 8-11).

* Mr. Justice Jackson granted a stay of execution on April 7, 1952, pending a determination of this application.

Mr. Justice Reed, by order duly entered on June 3, 1952, extended petitioner's time within which to file his petition and brief to June 6, 1952.

** References herein, unless otherwise indicated, are to the pages of the certified record of the trial submitted herewith.

*** People's Exhibit 59, Rec., 2875-2886.

**** Rec., 160, 1174, 1275-1280, 1305, 1444, 1451, 1520, 1521, 1522-1542, 2273-2275.

***** Section 1044 of the State Penal Law.

C.

Question Presented

Whether the right of a defendant to be accorded due process of law under the provisions of the Fourteenth Amendment of the Constitution of the United States has been invaded and violated:

- (a) when a confession, conceded by the testimony of State Police to have been obtained from defendant some 36 hours after he had been arrested on the street near his home in the City of New York, and thence carried off to an isolated barracks of the State Police in a county outside the City of New York, where he was incarcerated, incommunicado, without opportunity to consult with friends or counsel, kept handcuffed, fully clothed, at all times, and subjected to incessant questioning for at least twenty hours between the evening of June 5th and the late evening of June 6th, before confessing, during which period of time, arraignment was delayed in violation of State Law, is admitted in evidence against the defendant on trial for his life?
- (b) when, in addition to the above conceded facts, there is put in issue the defendant's claim that he was physically beaten to extort his confession, and there is indisputable evidence of marks upon the defendant's body, which could have been caused only by the infliction of physical violence, a jury is permitted to speculate that such physical injuries may have been self-inflicted, in the absence of any proof whatever that they were or could have been self-inflicted, and thus ignore such marks of physical injury as indicating that the confession was forcibly extorted in violation of the defendant's right to due process of law;

- (c) when, in addition to the above facts, it appears that, during the period of defendant's incarceration, his brother and his elderly father were likewise incarcerated and held incomunicado, without arraignment, as required by State Law, and the defendant is driven to confess in order to obtain their release from such unlawful incarceration;
- (d) when a confession is allegedly obtained under the circumstances set forth above, and the issue of the voluntariness of the confession is submitted to the jury, the jury is instructed that it may nevertheless find the defendant guilty upon other evidence in the case, although it may determine that the confession was obtained by force and coercion, —and the trial Court refuses to instruct the jury to state specifically, in reporting its verdict, whether the jury found the confession to be a voluntary one?*

D.

Brief Summary of the Facts

On April 3, 1950, at about 3:00 P. M., at which time it was raining, four robbers held up a truck owned by the Reader's Digest Association on its private roadway, at Chappaqua, New York. One William Waterbury, accompanied by Andrew Petrini as messenger, was driving the truck to deposit company funds in a local bank. One of the robbers fired a single shot which struck Petrini's head and caused his death shortly thereafter.

Except for the testimony of the accomplice Dorfman,** there was no direct testimony by Waterbury or any other

* Rec., 2783.

** Section 399 of the Code of Criminal Procedure requires corroboration.

witness identifying Cooper as one of the robbers. The other proof as to him was essentially circumstantial.

The testimony of the accomplice Dorfman and the circumstantial evidence against Cooper were bolstered by a confession of Cooper extorted from him, as we shall later show, in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution—a confession, the admissibility of which petitioner resisted on that constitutional ground, at the trial and on appeal.

Where such a confession is improperly admitted in violation of a petitioner's constitutional guarantees, this Court has not attempted to evaluate the effect of the error and has not hesitated to reverse the judgment of a State Court, even though other credible evidence remained in the case.

Bram v. United States, 168 U. S., 532, 533, 540-42;
Stromberg v. California, 283 U. S., 359, 367, 368;
Lyons v. Oklahoma, 322 U. S., 596, 597;
Malinski v. New York, 324 U. S., 401, 404;
Haley v. Ohio, 332 U. S., 596, 599, 606;
Turner v. Pennsylvania, 338 U. S., 62;
Harris v. South Carolina, 338 U. S., 68.

E.

Circumstances Under Which the Confession of Cooper Was Obtained

The undisputed facts prove that the confession of petitioner Cooper was obtained from him as a result of brutal beatings inflicted by State Troopers, coercive conduct, mental torture, interrogation in relays over a long period of time—all in violation of the due process clause of the Fourteenth Amendment of our Federal Constitution.

Reserving for the Brief attached hereto the full details showing how the confession was extorted from him, we

state now that he was arrested on a Monday morning, June 5, 1950, and began his confession about 37 hours later. He was not arraigned in a Court of Justice until Thursday night, almost 85 hours after his arrest. When Dr. Vosburgh, the regular jail physician, a few hours later, examined Cooper and his two co-competitioners, he found on each one varied bruises and injuries, the result of beatings, as we fully demonstrate in our annexed Brief.

F.

Grounds Upon Which the Jurisdiction of This Court is Invoked

We respectfully submit that this Court has jurisdiction to entertain this petition for a writ of certiorari by virtue of Section 1257 of Title 28, U. S. C., and Rule 38 of the Rules of The Supreme Court of the United States.

At the trial and on his appeal to the Court of Appeals of the State of New York, the petitioner, invoking the protection of the Fourteenth Amendment of the United States Constitution, challenged the admissibility of his confession.

After the Court of Appeals of the State of New York affirmed the judgment of the County Court of Westchester County on March 6, 1952, it amended its remittitur on April 18, 1952, to read, as applicable to the petitioner, as follows:

“questions under the Federal Constitution were presented and necessarily passed upon by this Court viz: (1) whether the admission in evidence of the confession of the defendant Cooper violated his rights under the Fourteenth Amendment to the Constitution

of the United States, * * *. This Court held that the rights of the Defendants under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied".

G.

Reasons Relied Upon for the Allowance of the Writ

The Court of Appeals of the State of New York has decided a federal question of substance in a way "probably not in accord with applicable decisions of this Court" (Rule 38 of the Rules of the Supreme Court), in holding that the rights of petitioner Cooper under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied, in the receipt in evidence against him of a confession obtained under circumstances unmistakably showing that it was obtained through coercion.

See:

- White v. Texas*, 309 U.S. 631;
- Ashcraft v. Tennessee*, 322 U. S. 143;
- Lyons v. Oklahoma*, 322 U. S. 596;
- Malinski v. New York*, 324 U. S. 401;
- Haley v. Ohio*, 332 U. S. 596;
- Watts v. Indiana*, 338 U. S. 49;
- Turner v. Pennsylvania*, 338 U. S. 62;
- Harris v. South Carolina*, 338 U. S. 68;
- Gallegos v. Nebraska*, 342 U. S. 55;
- United States v. Carignan*, 342 U. S. 36;
- Stroble v. California*, 343 U. S. (96 L. ed. (Adv. Op.)) 529.

Although this Court has enunciated and often reiterated the rule that the Constitutional guaranty in the Fourteenth Amendment of "due process of law" forbids a State from taking a defendant's life by using to convict him a confession forced from him by duress, it is apparent that that rule has not been readily accepted by at least some State Police and prosecutors. Instances constantly recur illuminating the various devices and subterfuges whereby attempts are made to emasculate the guard provided by that rule against the obnoxious practices of the Star Chamber, the Inquisition and the despotic power of tyrants.

The plight of your petitioner is a further illustration of a clear disregard of "that fundamental fairness essential to the very concept of justice".

Unless this Court intervene, not only will your petitioner and his co-petitioners who were defendants with him be deprived of life, but the precedent of this case in the great State of New York will indubitably be widely taken as a "Manual of Procedure" of methods which will not be condemned as oppressive though they provide an efficient means of extracting an unwilling confession.

Surely it is in contravention of "due process of law" that a defendant be imprisoned in an isolated place where no one is permitted to see what goes on and what tortures defendant suffers at the hands of his captors over a period of two days and an intervening night, with the knowledge that his brother and elderly father (against whom no accusation is made) are likewise confined, in handcuffs, in similar isolation from any friend, or family, or counsel—and all this in clear violation of a statutory requirement of prompt arraignment—during which unlawful imprisonment, for hour after hour after hour, day and night, the defendant's protestations of innocence are ignored by changing groups of armed troopers who sub-

ject him to endless questioning, until finally he buys the freedom unlawfully withheld from his father and brother by sacrificing himself, yielding up the demanded confession.

Is there not good and sufficient reason for allowing the writ of certiorari in the case at bar if only to decide whether a defendant, who has been questioned persistently while illegally held without arraignment, and who bore the marks of inflicted injuries, where the only witnesses to what transpired are his captors and himself, must waive his constitutional privilege against being compelled to testify in a criminal case against himself, as a condition of providing testimony that he was cruelly beaten and subjected to torture and thereby forced to confess?

Otherwise, this case stands for the proposition that if State Police bar any witnesses to their beating of a defendant save the perpetrators and the victim, so that there is no one else to contradict the Police who deny brutality, then the mute evidence of the marks of the inflicted injuries and the proof of the unlawful imprisonment, incommunicado, in violation of State Law, during which illegal detention there is subjection to persistent and prolonged police interrogation by relays of questioners, are not enough to establish reasonable doubt that the confession was voluntary.

Appended hereto is a brief in support of this petition.

Wherefore your petitioner, Calman Cooper, prays that a writ of certiorari may issue out of and under the seal of this Court to the County Court of Westchester County, State of New York, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the Record and all proceedings had herein, as heretofore remitted to the said County Court of Westchester County by the Court of Appeals of the State of New York; and

that the order of the Court of Appeals of the State of New York affirming the judgment in this cause may be reversed, and that petitioner may have such other relief as this Court may deem appropriate.

Dated: June 6, 1952.

CALMAN COOPER,
Petitioner,

By PETER L. F. SABBATINO,
Counsel for Petitioner.

STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK }

I hereby certify that I have examined the foregoing petition for a writ of certiorari, and that in my opinion it is well founded and the cause is one in which the petition should be granted.

PETER L. F. SABBATINO,
Counsel for Petitioner.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

CALMAN COOPER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
A WRIT OF CERTIORARI**

Opinion Below

The Court of Appeals of the State of New York affirmed without opinion the judgment of conviction and death sentence imposed upon petitioner.

Jurisdiction

The statement under which the jurisdiction of this Court is invoked, as well as the statement of the question presented, and the factual matter relevant to this application, appear in the petition to which this brief is annexed.

Argument

Petitioner urges that he has been convicted of the crime of murder, and sentenced to death, as the result of a trial in which there was received in evidence against him, over

his objection and exception; a confession obtained after prolonged interrogation, which confession was the result of police violence and coercion and the continuing fear and effect thereof, while petitioner was being illegally detained, incommunicado, all in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

POINT I

The admission in evidence of petitioner's confession was a violation of the rights of petitioner under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The question here presented is whether the confession of petitioner (Exh. 59, 2874-86),* received in evidence over his objection and exception, was made under such circumstances as to render it inadmissible under the due process clause of the Fourteenth Amendment to the Constitution of the United States and under the decisions of this Court interpreting that clause.

The conduct of the District Attorney of Westchester County and of the State Troopers, from the time that the Troopers seized petitioner Cooper until they secured his confession, weighed in the light of petitioner's injuries noted later by the official jail physician, forges an unanswerable argument that inescapably leads to but one conclusion—that Cooper's confession was not voluntary but the result of coercive conduct,** by law enforcement officers, repugnant to all civilized societies and condemned by guaranties contained in our Federal Constitution.

* Only a single copy of Vol. V (the certified copy), which contains the exhibits, is filed with the Clerk of the Supreme Court.

** Such a confession is also barred by Section 395 of the New York State Criminal Code of Procedure.

Calman Cooper was arrested on Monday morning, June 5, 1950, at about 9:10 A.M., confessed late Tuesday night, was arraigned late Thursday night, was found by Dr. Vosburgh, the jail physician, with multiple injuries on various parts of his body, a few hours later, on Friday morning, and proved, at his trial, through the lips of hostile witnesses, the utter indifference and contempt of law-enforcement officers for constitutional processes.

Let us examine in detail, and as far as possible, chronologically, the events that should have led the trial judge, and we respectfully contend, must lead this Court, to reject Cooper's confession, as a voluntary one, because obtained in violation of the Constitution.

Seven or eight State Troopers (Rec., 1337-8), accompanied by a New York City Detective (Rec., 1965), arrested Calman Cooper as a *participant in the murder* (Rec., 2071, 1400, 1423, 1181, 1364), in New York City, on West 120th Street, near his home, on the public streets, shortly after 9:10 A.M., on Monday, June 5, 1950 (Rec., 1310, 2998). At the same time, they also arrested his sixty-five year old father (Rec., 1311, 2998). They took both to the East 67th Street Police Station (Rec., 1965), where father and son were not placed in cells, but hidden away, handcuffed, in a police bedroom (Rec., 1337). They were not booked at the East 67th Street Police Station by any of the arresting officers (Rec., 1335-1341), although, to the admitted knowledge of the officers, they were required to do so (Rec., 1963).

Shortly thereafter, the Troopers spirited them away to the barracks of Troop K at Hawthorne, New York, located in another county, forty miles from the place of arrest (Rec., 1310).

Later that same Monday, the State Troopers arrested petitioner's brother, Morris Cooper, and brought him to the same barracks (Rec., 2040).

In order that this Court may properly appraise the conduct of the State Troopers toward the petitioner, we detail their conduct toward petitioner's elderly father and his brother as well.

At the barracks, the troopers put all three Coopers through what they consider the regular routine (Rec., 1185, 1191). They took photographs of the petitioner (Rec., 3006), of his brother Morris (Rec., 3004), and of his father Charles (Rec., 3002). They gave each prisoner separate criminal identification numbers, with June 5, 1950, as the date of arrest (three photographs, *supra*).

The Troopers took the finger-prints, the pedigree and a photograph of Cooper's father (Rec., 2998-9), although Sgt. Sayers, the arresting officer, admitted that he did not charge petitioner's father with a crime (Rec., 1364). They even filled out an arrest card, but, although the printed form (Rec., 2999a) provides for a "Brief History of Crime Committed", they alleged, as we have indicated, on that card, *no crime* against one whom they had photographed, finger-printed, and thereafter kept incarcerated *in handcuffs* (Rec., 1371) for *two and a half days* (Rec., 1374, 1375), without ever questioning him during that time—all without any legal sanction except their own arrogation of authority (Rec., 1371). The lawless State Troopers, in holding Charles Cooper, Morris Cooper and Beverly Wissner, defied the specific provisions of Section 618-b of the New York State Code of Criminal Procedure, which requires an order of a judge or Court to hold a person as a witness in a criminal proceeding. That illegal practice, admittedly a routine with them (Rec., 2251, 2256-7), has the approval of their superiors (Rec., 2256-7), and, from the consequences of which illegal practice they escape, or seek to escape, by having the one illegally detained execute a handy mimeographed form of general release. Only when it suits their purpose do they free their victims

(see release executed by Beverly Wissner, wife of co-petitioner Nathan Wissner, Rec., 2255, 2960).

The barracks, excepting for the use of the Troopers themselves, contained no sleeping facilities whatever for Cooper's father, and, in fact, none of the usual facilities, for eating and other necessities. There is no outside supervisory power that comes in to question whether or not persons held there are getting good treatment (Rec., 2013).

At the trial, the People sought to soften the illegality of the arrest and incarceration of Cooper's father, by offering *oral testimony* that Cooper's father was held on "suspicion" (Rec., 1214, 1215), or "investigation of a felony" (Rec. 1370),—testimony, however, which was contradicted by their own *written record* of June 5th (Rec., 2999a), which, upon its face, showed no reason for the arrest and detention.

During the trial, the District Attorney in chambers, brazenly argued—in the face of all the preceding facts—"that there is no proof of incarceration of Cooper's father", but, "there is proof that he was up in the barracks" and "it is open to the public" (Rec., 1304).

What happened to Cooper's father and to Wissner's wife is a part of the total picture of what happened to petitioner Cooper between his arrest and his arraignment. To establish the involuntariness of the confession, the defense called to the witness stand State Troopers—all hostile witnesses—who had had contact with petitioner Cooper before he confessed late Tuesday night.

No one would expect—certainly no Judge of this Court—that the defense would accomplish a miracle, and secure direct proof from a State Trooper that he had participated in beating Cooper, or that he had witnessed his fellow-officers do so.

The People, as we shall later show more fully, sought to explain the injuries of Cooper by two theories—first by

a fantastic story—exploded by their witness Jepperson and Dr. Vosburgh—that Sgt. Sayers inflicted the injuries when he arrested Cooper on a public street in New York City, and, secondly,—the only explanation urged by the prosecutor in summation,—that they were self-inflicted (Rec., 2708, 2712).

The trial court erroneously gave weight to the flimsy explanation offered by the People and improperly submitted the issue as one of fact for the jury.

We respectfully contend that this Court must reach a different conclusion—that there was no issue of fact to submit to the jury, that it was the duty of the trial court, upon the facts and circumstances we shall now detail, to reject the confession as involuntary, as a matter of law.

Calman Cooper, from the time he was imprisoned, was always handcuffed, watched by armed Troopers, held in one room, fifteen by twenty feet, which contained desks, filing cabinets, chairs, etc., a sketch of which appears on page 2964 (Rec., 1369).

The isolated barracks at Hawthorne (Rec., 1339, 1340, 1599), contain no facilities for prisoners (Rec., 1369). Some Troopers always saw Cooper, during the day or night, sitting on a chair, but never saw a mattress (Rec., 2004, 2008, 1356); others testified that they saw Cooper on a mattress after midnight, Monday. If a certain Trooper is to be believed, he saw Cooper in an office, with a light burning throughout the night (Rec., 1431), lying on a bare mattress on the floor, with both hands handcuffed (Rec., 1399, 1435). He was fully clothed at all hours (Rec., 1397). He had his coat, trousers, shoes and socks on (Rec., 2103). There is no showing where, when, or how, petitioner slept on Tuesday or on Wednesday.* It is interesting to note that, when

* It is apparent that the State Troopers fabricated the story of a mattress, for certainly they would not permit Cooper and Mrs. Wissner to sleep on the same mattress in the same office on the same night. See further discussion on this inconsistency on page 19, *infra*.

helpful to the prosecution to do so, testimony was given by a State Police employee that Mrs. Wissner slept on a mattress on Wednesday night, June 7—on the very mattress and in the very room allegedly occupied by Cooper (Rec., 1656, 1657).

On Monday, the day of his arrest, petitioner Cooper was subjected to continuous questioning from 8:00 P. M. to midnight, or 1:00 A. M. the following day, by different Troopers.

On Tuesday morning, he was again subjected to continuous questioning. Such grilling continued throughout the day until 6:00 P.M. The twelve page confession, reduced to writing and signed on Wednesday morning, began about 10:00 P. M. on Tuesday night (Exh. 59, Rec., 2874-86), and did not end until 2:00 A. M. on Wednesday morning (Rec., 1317):

From what preceded the giving of the confession, and from what followed, we ask this Court to reach the evident conclusion that the confession was extorted.

In the light of reason, let us test the veracity of the Troopers—that they questioned, but did not beat, Cooper.

Sgt. Barber of the State Police, admitted that he began questioning Cooper, in the presence of armed guards (Rec., 1393, 1394, 1403, 1404), at 8:00 P. M. on Monday night, eleven hours after his arrest (Rec., 2072). He questioned Cooper for five hours (Rec., 2074, 2077, 2081). Sgt. Sayers and Trooper Buon were with him during those five hours (Rec., 2073). They, too, participated in the questioning (Rec., 2073). Cooper persisted in his denials of complicity (Rec., 2099). The Troopers admitted that their questioning resulted in failure (Rec., 2075, 2102). When Sgt. Barber retired at 4:00 A. M. Tuesday—19 hours after petitioner Cooper's arrest—Cooper had not confessed (Rec., 2080). Sgt. Sayers and Trooper Buon resumed their questioning on Tuesday morning, and questioned Cooper until noon time (Rec., 1357, 1361, 2075, 2102). In

fact, Sgt. Barber "questioned" him most of the time, from Tuesday morning until around dinner time (Rec., 2074). Trooper Buon, too, "questioned" him, on and off, all afternoon on Tuesday (Rec., 2119).

There can be no doubt but that the purpose for which petitioner was held incommunicado for days at State Police barracks was solely one to afford the State Police an uninterrupted illegal opportunity to extort from petitioner, by whatever means they were disposed to use, the confession that was later used against him.

Witnesses for the People testified that Cooper confessed—not because, as we contend, he was beaten—but because he wanted to secure the freedom of his father and brother (Rec., 2115, 2116, 1372). That desire came to him at 6:00 P. M. Tuesday—after he had been "questioned" by Sayers, Barber and Buon, all day (Rec., 2115). *Handcuffed son was led to the presence of handcuffed father* when the alleged bargain was sealed (Rec., 1372). The alleged bargain of Tuesday night, the People contend, led to the release of the handcuffed father, not on the same night, but on the following night, Wednesday, June 7th, at about 9:00 P. M. (Rec., 1380, 1382).

It is highly significant that Sgt. Sayers, Sgt. Barber and Trooper Buon, the chief "questioners", never had a stenographer present when they "questioned" Cooper—although Mrs. Anna A. Klaus, a stenographer attached to Troop K, at Hawthorne Barracks, was available both on Monday afternoon (Rec., 1574) and on Tuesday morning, when she reported for duty, but was strangely denied access at 9:00 A. M. (Rec., 1641), to the office where she regularly did her work (Rec., 1634) and where Calman Cooper then was, on the pretext that someone was sleeping there (Rec., 1642) and, forsooth, they dared not disturb him.

It is more logical to infer, from the Troopers' refusal to have Mrs. Klaus work in her usual room on Tuesday morn-

ing, that the Troopers did not dare to have her become a witness to what they intended to continue to do to the only stranger in the room, Calman Cooper. That Tuesday morning, at 8:00 A. M. (Rec., 1397), Trooper Hess had arrived to relieve Trooper Leon in guarding Calman Cooper (Rec., 1396). Cooper had on his trousers, shirt, socks, and perhaps his shoes (Rec., 1397). Between 8:15 and 8:30 that morning Troopers Lambrecht and McLaughlin arrived at the same office (Rec., 1402), at which time Cooper was awake (Rec., 1402). When, therefore, the Troopers denied Mrs. Klauss entry, later, at 9 A. M., on the alleged ground that Cooper was asleep, it is apparent that they lied to her to bar her from witnessing their continued "third degree" activities.

In the determination of the issue of whether the confession was extorted, there is a consideration even more significant than the failure of the Troopers to use an available stenographer. *None of the "questioners" made a single written notation at any time* of what their "questioning" revealed for their five hours' work on Monday night and for their work on Tuesday, from morning to 6:00 P. M. (Rec., 2072, 2074, 2101, 1352, 1357).

How could they fail to take a single note, after questioning Cooper in relays, during long hours Monday night and even longer hours all day Tuesday, if, in truth, they were merely questioning him? They conveniently, but falsely, explained their conduct of brutality by testifying that they were questioning him, and yet, were unable to repeat what they asked and what he answered, because, in truth, Monday night and all day Tuesday were devoted, not to interrogating him, but to beating him.

Nor did the State Troopers use as stenographer, during the long, alleged periods of "questioning", Trooper McLaughlin, himself a stenographer, who ultimately typed petitioner's confession on Tuesday night, for he was pres-

ent at the barracks during all the period of time that petitioner was held there, and, in fact, worked in the very room where petitioner was held. (Rec., 1195).

The realities of the situation herein disclosed lead to the inevitable conclusion that the bruises noted Friday morning were the results of the secret "questioning" of the preceding Monday and Tuesday.

Did the solicitous State Troopers ever really supply Cooper with a mattress Monday night to rest himself—both hands handcuffed, fully dressed, with a light burning, in an office crowded with office furniture? It was clearly an afterthought by the Troopers, in anticipation of a probable review by the Courts of the issue of brutality, in an effort to escape the logical inference that Cooper, without sleep, was subjected to many more hours of questioning and physical violence.

Sgt. Sayers, the arresting officer and chief "questioner" testified unequivocally that *he never saw a mattress at any time* (Rec., 1350, 1351, 1358); nor did Mrs. Klaus on Wednesday morning (Rec., 1637), *after the confession. No such pretended sleeping accommodations had ever been supplied to any one in her previous three years of employment there.* (1647).

On the issue of the voluntariness of the confession, we respectfully ask this Court to draw its own proper inferences from the conduct of the State Troopers when they arrested Calman Cooper in New York City. (Rec., 1225). They never notified the District Attorney when they brought Cooper to the East 67th Street Police Station, or when they brought Cooper to the barracks (Rec., 1225). The State Troopers never notified the District Attorney when they questioned Cooper on Monday night for five hours. They never notified him when they questioned Cooper on Tuesday morning (Rec., 1360). District Attorney Fanelli testified that he learned of the arrest of peti-

tioner Cooper only on Tuesday afternoon, June 6, when at his office he was questioning Arthur Jepperson, a witness for the prosecution who was present at the time that Cooper was arrested in New York City on Monday morning (Rec., 788, 789, 1225). Did the District Attorney rush to the barracks to question Calman Cooper on Tuesday afternoon? He testified that he did not go to the barracks, or even telephone on Tuesday to inquire about the petitioner (Rec., 1225, 1226), even though he admittedly then knew about petitioner's arrest (Rec., 1225-1226). Nor did he complain about the Troopers' failure to arraign the petitioner Cooper on Monday night (Rec., 1227). Although Dorfman—much later—was arraigned *on the very night of his arrest*, the District Attorney did nothing to cause the arraignment of Cooper on Monday night, on Tuesday night or on Wednesday night, or on Thursday morning or on Thursday afternoon, despite the fact that the New Castle Court was available for arraignments at *any time or any hour* (Rec. 1270). The District Attorney was under the impression—contrary to the specific command of a New York State Statute*—that the law tolerates “a certain reasonable delay” (Rec., 155, 1226). Capt. Glasheen, commander of Troop K of the State Police, was of the opinion that he could wait until the rest of the suspects were *taken into custody* (Rec., 2008).

Ward v. Texas, 316 U. S. 547, 550;

McNabb v. United States, 318 U. S. 322;

Ashcraft v. Tennessee, 322 U. S. 143;

Malinski v. New York, 324 U. S. 401, 404;

Turner v. Pennsylvania, 338 U. S. 62;

Harris v. South Carolina, 338 U. S. 68.

* Sect. 165 of the Code of Criminal Procedure. Rule 5 of the Federal Rules of Criminal Procedure, like the State Statute, provides for arraignment “without unnecessary delay.” Section 1844 of the Penal Law of the State makes it a penal offense to disobey.

The petitioner Cooper, with Stein and Wissner, was arraigned at about 10:00 P.M. on Thursday, June 8—*almost 85 hours after his arrest* (Rec., 1268, 2150).

None of the three petitioners was represented by counsel, none had a single friend or relative present. Not a single member of the Bar, excepting the prosecutors, was present that night (Rec., 2177). The petitioners appeared before the Court handcuffed (Rec., 1330), and surrounded by numerous State Troopers (Rec., 2894). The presiding magistrate, himself, permitted the taking of a photograph from behind his bench (Exh. 62, Rec., 2894), during the actual arraignment in his courtroom, in violation of a specific prohibition of the Rules of the Appellate Division of the Supreme Court covering his judicial Department* (Rec., 2014).

It is of little significance here that Cooper did not complain of a beating before the Committing Magistrate on Thursday night. He had been within the absolute power of the State Troopers for *three and a half* days. There was no proof as to whether his mind, or the mind of Stein or Wissner, was functioning; whether they had had sufficient sleep or food; or whether they had received any drug.

The interesting and revealing photograph of the courtroom arraignment (Exh. 62, Rec., 2894)—the photograph does not show all the Troopers who were in the courtroom (Rec., 1327)—shows how completely the three, cowed and visibly handcuffed in court, were surrounded by armed Troopers.

The State Troopers, after the arraignment, continued to have custody of Cooper and his two co-petitioners. Shortly before midnight, on Thursday, June 8th, the State Police lodged Calman Cooper and his two co-petitioners

* Special Rule adopted on April 20, 1938, by Second Department.

in the Westchester County Jail (Rec., 1273, 1858). The three were separately locked in widely separated cells in different cell-blocks (Rec., 1273, 1858).

On Friday morning, June 9th, Cooper, Stein and Wissner appeared before the jail physician, Dr. Vosburgh. Only about ten hours had elapsed from the time the State Troopers lodged them in the County Jail until each was brought to Dr. Vosburgh;—each from his separate, distant, solitary, individual cell.

We now discuss the jail conditions during the ten hours preceding the petitioner's appearance before the jail physician to prove the falsity of the prosecution's attempted explanation of the injuries that Dr. Vosburgh found.

Exhibit QQQ, on page 3008, is a page of the Official Book of the Westchester County Jail. It shows that Nathan Wissner, taken from Cell No. 2F3, was the first one examined; Harry Stein, taken from Cell 2B7, was the second; Calman Cooper, taken from Cell 2A1, was the third.

Exh. QQQ, on page 3014, is the sketch of part of the jail. Stein is in the cell in the upper right. Cooper is in the cell in the lower left. Wissner is elsewhere, not in the same area.

Maynard A. Allen, a Deputy Warden connected with the County jail, testified to facts which completely negatived the possibility that Cooper, Stein and Wissner could have connived to inflict the injuries on themselves so as to present themselves in the condition in which Dr. Vosburgh found them. Allen testified that Sgt. Sayers brought the prisoners to the County Jail at 11:45 P.M., on June 8, 1950 (Rec., 1273, 1858). Stein's cell, we have shown, was on one extreme and Cooper's cell was on the other extreme, of the Cell Block (Rec., 1867). No other prisoner occupied any cell on Cooper's side; no other prisoner occupied any cell on Stein's side (Rec., 1869). The cells of

these prisoners were barred at all times, except when the keeper went there (Rec., 1869). The two cell blocks shown in the diagram were three and a half feet apart. They were fifty feet in length. They had solid walls (Rec., 1870). There was only a twenty inch-square ventilating screen in each cell, with a heavy wire mesh (Rec., 1870). The corridor was dark. One prisoner could not see another prisoner in a cell.

Wissner, also, was in a cell by himself. There were only empty cells along his side of the cell block, too. All three prisoners were kept in solitary confinement (Rec., 1875). Wissner's cell is not shown on the diagram in evidence, because, as explained before, it was in a different part of the jail (Rec., 1882).

The physical set up and barriers in the jail were thus such that the opportunity at connivance at self-inflicted injuries was impossible, unless defendants had recourse to shouting—of which there is no evidence—and which would have awakened the entire jail and exposed defendants to discovery and detection by the prison guards.

Deputy Warden Allen brought each prisoner *alone* from his cell to Dr. Vosburgh's clinic, and returned each prisoner *alone* from the clinic to his own cell (Rec., 1860). No other prisoner was present when the doctor examined each one individually (Rec., 1860).

It is apparent, therefore, that Wissner, the first to be brought to the clinic, was examined alone that Friday morning; that Stein was examined alone, and that Cooper was examined alone. It must tax this Court's credulity, that the District Attorney could argue that Cooper, Stein and Wissner inflicted upon themselves, for any ulterior purpose, the injuries which Dr. Vosburgh officially noted that morning—a few hours after their release from the custody of the Troopers (Rec., 2708, 2713).

We now note the injuries Dr. Vosburgh found on each of the three petitioners.

On Wissner, the non-confessing defendant arrested at 9:00 A. M. on Wednesday, June 7, and the first prisoner he examined Friday morning (Rec., 1754), Dr. Vosburgh noted and officially recorded "bruises (on) left posterior lateral chest", with "abrasions (on) both shins", evidently open wounds (Rec., 1771). Dr. Vosburgh also noted a fracture of a rib (Exh. PPP, Rec., 3011), later confirmed by an X-ray report of Wissner, taken three days later, which read as follows: "There is a fracture of the left sixth rib, slightly anterior to the mid axillary line. The fragments are without appreciable displacement" (Rec., 2957). On the day that Wissner was X-rayed, Dr. Vosburgh also noted "small ecchymotic areas of both thighs, small ecchymotic area of the left side of abdomen and buttocks (and, a) small lump on head" (Rec., 3012).

On Stein, second to be examined alone, Dr. Vosburgh reported officially "bruises (on) left bicep area" (Rec., 2909), "in the left upper arm, between the elbow and shoulder" (Rec., 1713). John J. Duff, Stein's attorney, examined him a few hours later, and made a more detailed observation of the injuries of Stein (Rec., 1838). He observed "bruises on the left arm, his right arm and left lower ribs below the breast" (Rec., 1839).

On petitioner Cooper, last of the three to be examined (Rec., 3008), Dr. Vosburgh noted "bruises (on the) left posterior lateral chest, abdomen, (in the) right bicep area (and on) both buttocks" (Rec., 2971; 1237-9, Exh. BBB, 2971), black and blue marks (Rec., 1238), and injuries under the left armpit (Rec., 1244).

We shall now detail events which showed the resistance of the District Attorney to our efforts to perpetuate full proof of the injuries of Calman Cooper. We shall also point out his conduct, which clearly indicates that there

was no desire on his part to question the Troopers about their brutality. His failure to do so, is positive indication that Cooper and the others were beaten and that, therefore, it would have been a futility for the prosecutor to probe the Troopers about a charge of brutality, that was true.

Mr. Thomas J. Todarelli, a member of the Bar, together with his law partner, Peter J. F. Sabbatino, visited Cooper on Saturday, June 10th. He found at the County jail, Daniel J. Riesner, another attorney, who was then visiting Cooper (Rec., 1259). Cooper stripped in the presence of the attorneys (Rec., 1260). Mr. Todarelli noted the injuries of Cooper on Saturday, June 10th, at 2:00 P. M. (Rec., 1260). A complete description of Cooper's injuries, as noted by Mr. Todarelli, is found on pages 1260 to 1262 of the certified record. Mr. Todarelli's description supplements Dr. Vosburgh's report (Exh. BBB, Rec., 2971).

District Attorney Fanelli admitted that Cooper's attorney telephoned him on Saturday, June 10th (Rec., 1228, 1229). He admitted receiving and reading our telegram that same Saturday (Rec., 1231). He recalled that on that same Saturday we asked him for permission to have a physical examination of the defendant Cooper (Rec., 1284). Mr. Fanelli conceded that we complained to him on June 10th concerning the Vosburgh report of June 9th (Rec. 1294). He admitted further that we complained about the inadequacy of the examination (Rec., 1294). The telegram contained, in part, the following language: "official records do not show true extent of injuries he received" (Exh. ccc, telegram, Rec., 2793; 1290, 1291).

In spite of these protestations, Cooper's attorneys did not succeed in inducing Mr. Fanelli to consent to an examination by another physician on that Saturday or at any other time.

Swarz, the photographer at the jail in which petitioner was held, testified that the facilities and equipment were available, and he was capable of taking a full length picture of the petitioner, stripped, were he so ordered to do (Rec., 2187).

On Tuesday, June 13th, Mr. Todarelli appeared before the then County Judge, Hon. Elbert T. Gallagher, who subsequently presided at the trial in this case, and complained to him about the mistreatment of Cooper and requested that a physical examination of Cooper be permitted (Rec., 2982-2983). A transcript of Mr. Todarelli's application before Judge Gallagher, and the resistance of the District Attorney to have Cooper examined, are contained in Exh. ddd for identification, pages 2974-2981. This exhibit the Court refused to receive in evidence at the trial (1258, 1259). On June 15th, Judge Gallagher again refused to permit a physical examination of Cooper by another Doctor (Rec., 12, 13; 2989, 2990).*

District Attorney Fanelli further admitted that Cooper sued out a writ of habeas corpus, returnable before Mr. Justice Flannery. The State Supreme Court denied relief (Rec., 1308-1309). The petition for the writ and the affidavit of the District Attorney in opposition in the State Supreme Court, appear on pages 2984-2988, and are marked Exh. fff for identification. They were denied admittance in evidence over our exception (Rec., 1283).

A serious complaint of police brutality, supported by Dr. Vosburgh's report evidencing injuries, having been

* Mr. Todarelli, on the arraignment, addressed Judge Gallagher, in part, as follows:

*** there cannot be any danger whatever of showing to your Honor here in open court the marks of violence that were inflicted upon the defendant and which he now bears, even though a week has elapsed since the last of the beatings took place. *** I now offer to show your Honor the marks that appear upon this man's body here in open court. If your Honor does not do that I stand prepared to produce a Westchester physician; it can be done in open court or in chambers."

made promptly to the District Attorney by three members of the Bar, in a case involving a charge of murder, where a confession had been obtained as a result thereof, as charged by the defense—what was the District Attorney's sworn duty? Was it not his duty to investigate at once to ascertain the facts so as to brand the accusation as false or to accept it as true?

District Attorney Fanelli testified that he did talk to some of the Troopers about our accusations (Rec., 1233). However, he did not recall when he questioned them, nor did he make a stenographic record, nor any kind of official record of his interviews with those Troopers (Rec., 1233), nor did he make any private notes (Rec., 1233). None of the Troopers who took the stand, however, testified that he was ever questioned by the District Attorney about any beating of Cooper.

Trooper Buon, one of the trio of "questioners", testified that he was never questioned by Mr. Fanelli, nor was he ever questioned by anyone else as to whether he had ever beaten Cooper (Rec., 2125). His superiors, Sgt. Sayers and Sgt. Barber, never questioned Buon. Capt. Glasheen never questioned Buon (Rec., 2125). Strange as it may seem, Trooper Buon testified that he had heard about Cooper's black and blue marks for the first time when he testified on the witness stand (Rec., 2124).

Capt. Glasheen was commander of Troop K of the State Police at Hawthorne, New York. He had never heard that we had sent District Attorney Fanelli a telegram (Rec., 2047), nor was he ever questioned by the District Attorney about its contents (Rec., 2048). As a matter of fact, the first time he had heard of our telegram was while he was on the witness stand, under questioning of Cooper's defense counsel (Rec., 2048). Capt. Glasheen admitted that he was never questioned by the District Attorney about the charges of brutality against his Troopers made by

Cooper's Attorney in that very courtroom, nor was he ever questioned by anyone else (Rec., 2048). The charges made by Mr. Todarelli before Judge Gallagher were never called to Capt. Glasheen's attention (Rec., 2049), nor had any Trooper, he admitted, ever told him that such charges had ever been made on Tuesday, June 13th (Rec., 2049).

The stenographer, Anna A. Klaus, was never questioned by anyone about her knowledge of any beatings of Cooper (Rec., 1650).

Corporal McLaughlin, who typed the confession, was never questioned by the District Attorney, about the beatings of Cooper up to the very moment that he was on the witness stand. *He knew of no one in Troop K that had ever been questioned by Mr. Fanelli.* (Rec., 1217). Dr. Vosburgh's report was never called to Corporal McLaughlin's attention (Rec., 1217). No one in official authority had ever questioned him about the beating of Cooper (Rec., 1218).

John F. Reardon, attached to the New York State Division of Parole (Rec., 1441), testified that he was at the barracks on Monday, June 5th, at 7:00 P.M. (Rec., 1441). He did not see Cooper that night, although he remained there until 9:00 P.M. (Rec., 1441), and he knew that Cooper was there on a murder charge (Rec., 1462). He returned on Tuesday about 7:00 P.M. and, at about 8:00 P.M., saw Cooper, whom he had never seen prior to that evening (Rec., 1441, 1442, 1448). He never saw, and never spoke to, Cooper alone, but always in the presence of a State Trooper (Rec., 1464).

Reardon was a witness to the written confession. He testified that he was never told by the District Attorney, nor by any one else, before he took the witness stand, that the defense claimed that Cooper's confession was brought about by beatings (Rec., 1466). He never heard it from the District Attorney, nor from any of his assistants

(Rec., 1467). He admitted that he had heard at the barracks that there were newspaper reports about the alleged beatings (Rec., 1468), but he could not name any specific Trooper with whom he had had any such discussion (Rec., 1448). He never asked to go to see Cooper to seek verification of the truth or falsity of the report (Rec., 1469).

Assistant District Attorney O'Brien made the statement, in open Court before the jury, "that the press never did carry a story that the defendant was beaten" (Rec. 1470). To meet the challenge of the Assistant District Attorney, we offered in evidence a headline contained in the Reporter Dispatch, published on Tuesday, June 13, 1950, in the City of White Plains, where the trial of this cause took place (Exh. 3 for identification, p. 3000). Although the Assistant District Attorney was shown the newspaper headline (Rec., 1471), he refused to retract his statement, the Court refused to direct him to do so (Rec., 1473), and the newspaper clipping, which disproved Assistant District Attorney O'Brien's statement before the jury, was denied admission in evidence, over our exception (Rec., 1472).

Mr. Reardon, even up to the time that he took the stand, had never telephoned to Mr. Capelli to check on the charges that Cooper had been beaten (Rec., 1474). He never sought to speak to Cooper privately at the time Cooper was asked if the statement was voluntary (Rec., 1479), although he had heard of the "Third Degree" (Rec. 1478). He did not ask that Cooper be stripped to be sure that he had not been beaten (Rec., 1480). He made no inquiry as to whether Cooper had been fed, or whether he had received water to drink (Rec., 1484). He made no inquiry as to whether Cooper had slept (Rec., 1485), nor whether he had been denied toilet facilities (Rec., 1486). He did not ask Cooper whether he had been forced to stay awake (Rec., 1486). He never even asked to speak to Cooper's father (Rec., 1488).

Thus the statement by Cooper in his confession—that it was voluntary (Rec., 2886)—becomes meaningless, even though witnessed by Reardon. In the light of the foregoing significant facts elicited during Reardon's examination, his testimony that he noticed no wounds on Cooper's body (Rec., 1449, 1454), are mere empty words, for the wounds of Cooper were beneath his clothing, and therefore not visible to this witness, who displayed utter indifference to ferret out facts to challenge the veracity of the voluntariness of the confession, despite the fact that Cooper had been under arrest and not arraigned for 36 hours when the Troopers began to take his written confession.

Sgt. Sayers, a "questioner" of Cooper, admitted that Mr. Fanelli never informed him about Mr. Todarelli's accusations, made Saturday morning, June 10th. Sayers testified that he was never questioned by Mr. Fanelli, or by any of Mr. Fanelli's assistants, about the charges made by Cooper. Nor had Mr. Fanelli ever called to Sayer's attention Dr. Vosburgh's report (Rec., 1362, 1363).

Sgt. Sayers sought to account for Cooper's injuries by an explanation patently shown to be false by the testimony of Jepperson, a prosecution witness, and by Dr. Vosburgh, the jail physician. When Sayers searched Cooper at the time he arrested the petitioner, Sayers found on Cooper a black notebook (Rec., 1332) which, Sayers said, "was not what I was looking for, and with that, I took him and grabbed him by both arms and as he started to wheel around; I threw him against the building" which "has a cement wall" (Rec., 1310, 1311). Strangely enough, Sayers admitted on cross-examination that it was the fact that he found on Cooper this black *note-book* which prompted him to push Cooper against the building (Rec., 1332).

Sayers further admitted that he pushed Arthur Jepperson "the same way" (Rec., 1332). But Jepperson, called by the District Attorney as his witness, flatly contradicted

Sayers' testimony and swore, under questioning by Mr. Fanelli, that he "wouldn't say that they pushed him" (Cooper) (Rec., 810).

Sayers testified that he pushed Cooper *only once* (Rec., 1332). But Dr. Vosburgh testified that the injuries Cooper had could be accounted for only "by being thrown against a stone wall *numerous times*" (Rec., 1253).

That Sayers' explanation was a recent futile fabrication by him is shown by his own words as well as by the conduct of the prosecutors. The charge of brutality, we have shown, was made on June 10, and yet, it was not until September, or October, or November, that Sayers gave Mr. Fanelli his "explanation" (Rec., 1334). Mr. Fanelli conceded at the trial that he never took any statement from Sayers, in which Sayers gave his court-room explanation of Cooper's injuries (Rec., 1333).

That the explanation offered by Sgt. Sayers was a recent fabrication, born of necessity, is further proved by Dr. Vosburgh's testimony. The jail physician testified that the District Attorney had never questioned him about the report that he had filed, in which he detailed Cooper's injuries (Rec., 1251). It was not until October or November—that is, about the time the trial began or was scheduled to begin—that Mr. Marbach and Mr. John O'Brien, two Assistant District Attorneys who participated in the trial (Rec., 112), discussed his report with him (Rec., 1258). However, it is ~~significant~~ that the two prosecutors did not urge, at the interview, that Cooper had been knocked against a stone wall by anyone, or that someone had grabbed Cooper forcibly by the biceps (Rec., 1258).

However, as we have previously noted, the District Attorney, in his summation, evidently abandoned the "grit-stone-wall" explanation of Sayers as too palpably false and relied on the "self-inflicted" theory, for the support of which there was a total lack of any evidence whatsoever.

If the injuries were self-inflicted, they could only have been self-inflicted during the 10 hours that the three petitioners spent in the County Jail before their examination by Dr. Vosburgh. That theory was exploded by Dr. Vosburgh, who testified that the injuries of Cooper were "possibly not a week" (old), but "possibly six days" (old), Rec., 1246), and that blows with a human fist, rubber hose or a club, were a competent producing cause (Rec., 1240).

None but the gullible could naively believe that Wissner, who had not confessed, would, during those 10 hours following his arraignment, fracture one of his ribs and injure himself to the extent found by Dr. Vosburgh.

We respectfully contend, therefore, that this Court has the power to do and should do what the trial Court failed to do—reject the confession as not freely made, because there was in law no issue of fact to be submitted to the jury.

Lisenba v. California, 314 U. S. 219, 240;

Ward v. Texas, 316 U. S. 547, 550;

Ashcraft v. Tennessee, 322 U. S. 143, 145;

Haley v. Ohio, 332 U. S. 596, 599, 600.

Federal Constitutional guarantees protect the petitioner from the use against him of a confession which was palpably extorted and inecontestably obtained during a period of time after he should have been arraigned.

State courts do frequently reverse when an extorted confession is admitted in evidence.

People v. Barbato, 254 N. Y. 170, 176;

People v. Mummiani, 258 N. Y. 394, 398.

A Constitutional guarantee, however, is not sustained but impaired where State courts give it only lip service and enforce it only by a repetition of generalities, as a trial judge did here, but sanction its violation by disregarding its protecting nature in actual practice.

It is this Court alone that can sustain the integrity of the due process clause where State Appellate Courts shut their eyes to a clear violation and, by affirming without opinion, impliedly sanction, in the twentieth century, a practice of torture condemned in every civilized state in the Western World.

A criminal, however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law.

People v. Moran, 246 N. Y. 100, 106;
People v. Levan, 295 N. Y. 31, 32.

Having allowed the confession of Stein and of your petitioner to be marked in evidence and given to the jury, the trial court instructed the jurors that unless they found that the confessions were voluntary, they should disregard their contents in reaching a verdict (Rec., 2767); but the trial court improperly refused to instruct the jurors to return a verdict of acquittal if they found that your petitioner's confession was not voluntary (Rec., 2778, 2781).

The trial court refused, although specifically requested so to do, to submit to the jury as a specific question, to be answered as part of the verdict, whether your petitioner's confession was brought about by fear induced by threats. The same request on behalf of Stein was likewise denied (Rec., 2783).

A judgment of conviction will be set aside by this Court even though the evidence, apart from the confession, might have been sufficient to sustain the jury's verdict.

Lyons v. Oklahoma, 322 U. S. 596, 597;
Maltinski v. New York, 324 U. S. 401, 404;
Gallegos v. Nebraska, 342 U. S. 55.

For all the foregoing reasons, it is respectfully submitted that the confession of the petitioner Cooper, being involuntary and obtained in violation of Section 395 of the Code of Criminal Procedure and of the due process clause of the State and Federal Constitutions, the trial court erred in submitting, over objection and exception, the voluntariness of the confession as a question of fact for determination by the jury.

Conclusion

No matter how clear the guilt of a defendant in any particular case may appear to arresting officers, prosecutors or judges, yet, this Court speaking for a civilized society, must not countenance a course of conduct which is repugnant to all but those blinded by an interest in a particular prosecution. Petitioner's rights under the Constitution have been unlawfully invaded.

The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A**United States Constitution, Amendment XIV, Section 1**

"nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B**Title 28, Sec. 1257, U. S. Code**

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari where any right, privilege or immunity is specially set up or claimed under the Constitution of the United States."

APPENDIX C**Federal Rules of Criminal Procedure:**

Rule 5. Proceedings before the Commissioner.

"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person *without unnecessary delay* before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States."

APPENDIX D**Code of Criminal Procedure of New York, Sec. 165:**

"The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

APPENDIX E

Penal Law of New York, Sec. 1844:

“A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.”

APPENDIX F

Penal Law of New York, Sec. 1044:

“The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: * * *

“2. * * * without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise:”

APPENDIX G

Section 399 of the Code of Criminal Procedure of the State of New York

“A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.”

APPENDIX H

Section 395 of the Code of Criminal Procedure of the State of New York

Confession of defendant, when evidence, and its effect.

“A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him unless made under the influence of fear produced by threats,—but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.”

78 of the New York Civil Practice Act (see Exh. II for defendant.). The proceeding was instituted at the earliest opportunity, by assigned counsel, whose assignment was not made by the Court until July 24, 1950 (14, 15), though application therefor had been made by Stein personally on June 16, 1950 (1848-1849). It should be further noted that there were, concededly, also six formal complaints made on behalf of Cooper (1228-1307; 2974-2983; 2984-2996; 1882), and two complaints on behalf of Wissner (1873-1874), and that all such complaints were "vigorously" opposed by the District Attorney (1874), and all were rejected.

It may be that Dr. Vosburgh's records, containing no mention of complaint by Stein, are "unalterable" (Respt's Brief, p. 27), but it is also undisputed that this same doctor, a county official, in practice some six years at the time, discriminated between his private and prison patients with respect to the questions which he directed to each to ascertain the medical history of complaint (1763, 1767, 1786, 1818). Dr. Vosburg stated "If they complain that they were beaten or anything of that sort I usually make a note on the sheet" (1243-1244). Also (1728), when asked "Didn't Stein tell you that he got that condition as the result of blows by State Troopers * * *?", he stated "There is no note here of any statement of that sort, and it usually has been my practice, in a case of that sort, to make a note". Yet, when challenged to produce samples of such notes, made during examinations of prisoners *other than the defendant*, Vosburgh admitted that there were none (1729), this despite his stated "usual practice".

It will be noted that, in the absence of any complaint by the defendant in *Malinski*, this Court nevertheless ruled his confession invalid. In *Turner, supra*, and *Johnson, supra*, the respondent in each case also argued failure of complaint, and the contention was disregarded by this Court.

This Court, petitioner is confident, will not be unduly concerned with the claimed desire of the New York State Police to arraign the three defendants simultaneously. It is the law of the case that the arraignment of all three petitioners was, as a matter of law, unnecessarily delayed. But, since the State Police did not have the time and leisure to extract a confession from Wissner that they had had in the cases of Cooper and Stein, they were, it is suggested, less careful, more anxious and more forceful in the interrogation and treatment of Wissner, and carelessly inflicted a fracture of the rib of Wissner, which was revealed upon the physical examination of Wissner by Dr. Vosburgh, the morning after the arraignment.

With a shocking disregard of the proprieties, and of the rights of these petitioners, Respondent refers (Respdt's Brief, p. 36) to the criminal records of petitioners, as they appear in the pedigrees taken by the Clerk after conviction. The answers which petitioners made to the Clerk's questions formed no part of the trial record, and any reference to them, in support of the argument that petitioners "were not unsophisticated youths, but mature males familiar with criminal court procedure" (Respdt's Brief, p. 36) is most improper. In any event, the argument is self-defeating, for if petitioners, by reason of their prior experience, were so thoroughly aware of the gravity and dread consequences of a confession, it is unthinkable that they would have, like so many immature, callow youths, made voluntary confessions of guilt whereby their lives might be forfeited, except under conditions of mental and physical compulsion. Indeed, the only rational conclusion to be drawn from the very criminal records which Respondent so improperly injects is that petitioners, *precisely because of their past experiences*, did resist vigorously, each to the limit of his endurance, any effort to obtain a confession. The injuries noted on the bodies of all three petitioners is mute proof of their resistance, within the limits of their respective endurance. In this regard it is appropriate to note that Stein was 52 years of age.

The right to due process stands foremost among the rights which the founding fathers carved out of the English Petition of Right*. We respectfully urge that to place this Court's seal of approval, even tacitly implied, upon the manner in which these confessions were obtained would not only be a negation of this ancient and traditional right, but would serve to enthrone police brutality throughout the land. Secure in the knowledge that precisely such odious practices as we have outlined have been noted with indifference, if not sanctioned, by the highest court in the land, police officers could then, and assuredly would, with impunity, make of these evil tactics the standard procedure in obtaining confessions.

The lamentable practices resorted to and admitted by the police in this case, as fully enumerated in petitioner's petition and brief herein (pp. 5-6, 26-27), cannot be squared with the decisions of this Court to which we have referred. These decisions show clearly that any one of the grounds raised is sufficient to require petitioner's conviction to be set aside (*Ward v. Texas, supra*, 555). When illegally delayed arraignment, holding of petitioner incommunicado, intensive interrogation and brutal beatings all occur in one case, the accumulated enormity of the error is such that, upon the tainted product of such official misconduct, the petitioner cannot, with justice, be sent to his death.

Respectfully submitted,

PHILIP J. O'BRIEN,
JOHN J. DUFF,
Counsel for Petitioner.

PHILIP J. O'BRIEN, JR.,
Of Counsel.

* The Petition of Right (1628) addressed by Parliament to the king, refers to the fact that "in the eight and twentieth year of the reign of King Edward the Third, it was declared and enacted by authority of Parliament, that no man of what estate or condition that he be, should be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law".

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 391

HARRY A. STEIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF NEW YORK

PETITIONER'S BRIEF

JOHN J. DUFF,
PHILIP J. O'BRIEN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 391

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HARRY A. STEIN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF NEW YORK

PETITIONER'S BRIEF

Statement

On December 21, 1950, petitioner, together with Calman Cooper and Nathan Wissner, whose briefs are being submitted separately, was convicted in the County Court of Westchester County of the State of New York of the crime of murder in the first degree, after a joint jury trial upon an indictment charging a "felony murder" under subd. 2 of Sec. 1044 of the Penal Law of the State of New York (set forth in the Appendix to this brief). The judgment of

conviction, entered December 27, 1950, sentenced the defendants to death. One Benny Dorfman was named as a defendant in the indictment, but his trial was severed, on motion of the District Attorney, and he testified for the prosecution (R. 8-11)¹. The judgment of conviction, as to all three defendants, was affirmed by the New York Court of Appeals, without opinion, on March 6, 1952 (303 N.Y. 856). A stay of execution, as to all three petitioners, was granted by Order of Mr. Justice Jackson, dated April 7, 1952.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C., Sec. 1257, this being a proceeding to review the final judgment of the Court of Appeals of the State of New York, the State court of last resort in which a decision could be had.

In said Court of Appeals petitioner especially set up and claimed, under the Fourteenth Article of Amendment of the Constitution of the United States, the right, privilege and immunity against being deprived by the State of New York of his rights, life and liberty, without due process of law, through the introduction in evidence of petitioner's written confession and alleged oral statements. As certified by said Court of Appeals (303 N.Y. 982), this point was "presented and necessarily passed upon by this Court" (Order Amending Remittitur, dated April 18, 1952), the point having been specifically presented in the brief and reply brief on behalf of petitioner, on the oral argument of the appeal from the judgment of conviction, and by adequate and timely objection and exception at every stage of the trial.²

¹ Numerals thus indicated refer to the pages of the Record.

² For all such objections and exceptions, see R. 460, 228-30, 1582-3, 1700, 1705, 1707-8, 1900, 1966-7, 1989-90, 1992, 1994, 2128, 2139-40, 2154, 2238, 2243.

A petition for writ of certiorari to review the judgment of the Court of Appeals affirming the judgment of conviction herein was filed in this Court by petitioner on June 2, 1952, under the authority of Title 28, U.S.C., Sec. 1257, and Rule 38 of the Rules of the Supreme Court of the United States. The petition was granted on October 13, 1952, as were the petitions for writs of certiorari of Calman Cooper and Nathan Wissner, "limited to the question as to the admissibility of the confessions".

Statement of the Case

On April 3, 1950, at about 3 P.M., on the private roadway leading from the Reader's Digest plant at Chappaqua, Westchester County, New York, four robbers held up a truck owned by the Reader's Digest Association, and escaped with three bags containing checks and currency, the property of the Reader's Digest Association (R. 204-5). The truck was being operated by William Waterbury, who was accompanied by a messenger, Andrew Petrini (R. 214). A single shot, fired by one of the robbers (R. 215), passed from the outside through the window glass of the right hand door of the truck, penetrated Petrini's head, and caused his death some hours later (R. 167, 171-2).

Just about two months later Cooper was arrested in the early morning of June 5th. (R. 1337), Stein was arrested at 2 A.M. on June 6th (R. 1958), and Wissner at 9 A.M. on June 7th (R. 1320, 1325), all in New York City. Each was taken, either within a matter of hours after his arrest, as in the case of Cooper, or immediately thereafter, as in the cases of Stein and Wissner, to the Hawthorne Barracks of New York State Police, in Hawthorne, Westchester County, New York, where they were held, incommunicado, without being arraigned before a Magistrate, from the dates of their respective arrests until 10 P.M. on June 8th.

The Trial Court ruled as a matter of law that the delay in arraignment of the three defendants was unnecessary and illegal, being in violation of state statutes (Sec. 1844, Penal Law of the State of New York; Sec. 165 New York Code of Criminal Procedure, set forth in the Appendix to this brief).

The District Attorney of Westchester County testified that he became aware on the afternoon of June 6th that Cooper had been in custody since the morning of June 5th (R. 1225).

There was police testimony concerning petitioner's confession and alleged oral statements. A written confession of petitioner's signed at 4:30 P.M. on June 7th, was admitted in evidence (R. 1969-1981, 2897-2903, Respondent's Exhibit 64), as were certain prior and subsequent oral statements (R. 240-1, 1700, 1909, 1991, 2160-4, 2238), over objection and exception by petitioner, and objection was specifically made that the admission of said written confession and oral statements was a denial of due process under the Fourteenth Amendment of the Constitution of the United States.

Cooper signed a written confession (R. 2874-86), Exhibit 59) on June 6th, which was admitted in evidence over his objection and exception, his counsel raising the same specific Constitutional objection that its admission constituted a denial of federal due process. Wissner did not confess. Upon the trial his counsel objected to the reception in evidence of the Cooper and Stein confessions, on the grounds set forth in his petition for writ of certiorari herein.

Question Involved

The sole issue to be determined, as to this petitioner, is: Did the admission in evidence of petitioner's confession and prior and subsequent oral statements constitute a viola-

tion of the rights of petitioner under the due process clause of the Fourteenth Amendment of the Constitution of the United States?

Facts Relied Upon, In Chronological Sequence

Cooper's Arrest, Detention and Interrogation.

We consider it desirable, in fact indispensable to an understanding of the situation in its totality, to give some account of the events which preceded Cooper's confession, for it is in the case of that petitioner, the first to be arrested, that we see unfolding the pattern of conduct on the part of the State Police which it is claimed spawned the confessions in this case.

While in the company of his 65 year old father, early in the morning of June 5th, Cooper was arrested on the street outside his home in New York City, as was his father, by seven or eight Troopers of the New York State Police (R. 1337-8), accompanied by one Milligan, a detective attached to the Borough of Manhattan Squad of the Police Department of the City of New York (R. 1310, 1956, 1965). They were taken to the East 67th Street Police Station, in New York City, the headquarters of the Borough of Manhattan Squad (R. 1957), where, though not booked (R. 1335-1341), they were kept, each of them handcuffed, until the State Troopers, around noon that same day, spirited them off to the Barracks of Troop K of the New York State Police, at Hawthorne, New York (R. 1311-36).

Later that day the State Troopers arrested a brother of the petitioner Cooper, and brought him to the same Hawthorne Barracks (R. 2040). All three Coopers were photographed and given separate criminal identification numbers (R. 2998-9, 3002, 3004, 3006). The aged father of Cooper was fingerprinted (R. 1372) and his pedigree taken (R. 2998). At no time was he questioned (R. 1368), or

APPENDIX I**Appellate Division, Second Department, Special Rules*****Improper publicizing of court proceedings.***

"The taking of photographs in a court room, during sessions of the court or during recesses between sessions, or the broadcasting of court proceedings, is forbidden.
(Added April 20, 1938.)

APPENDIX J**Section 618 B of Code of Criminal Procedure,
State of New York**

Judge may order witness to enter into an undertaking for appearance or be committed on refusal to comply therewith.

"Whenever a judge of a court of record in this state is satisfied, by proof on oath, that a person residing or being in this state is a necessary and material witness for the people in a criminal action or proceeding pending in any of the courts of this state, he may, after an opportunity has been given to such person to appear before such judge and be heard in opposition thereto, order such person to enter into a written undertaking, with such sureties and in such sum as he may deem proper, to the effect that he will appear and testify at the court in which such action or proceeding may be heard or tried, and upon his neglect or refusal to comply with the order for that purpose, the judge must commit him to such place, other than a state prison, as he may deem proper, until he comply or be legally discharged."

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IN THE

Supreme Court of the United States
No. 15 Misc. 391 OCTOBER TERM—1952

HARRY A. STEIN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

REPLY BRIEF OF PETITIONER HARRY A. STEIN

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IN THE
Supreme Court of the United States

No. 15 Misc.

OCTOBER TERM—1952

◆
HARRY A. STEIN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

◆

REPLY BRIEF OF PETITIONER HARRY A. STEIN

Because of the crucial nature of the question involved, and in view of this Court's "solicitude, especially where life is at stake, for those liberties which are guaranteed by the Due Process Clause of the Fourteenth Amendment" (*Hysler v. Florida*, 315 U. S. 411, 413), petitioner is constrained to file a Reply Brief, conformably with the provisions of Rule 38, Subd. 4(a) of the Rules of the Supreme Court of the United States. (Italics supplied.)

In its recital of "Record Facts Material to the Questions Presented" Respondent sets forth (Respdt's Brief, pp. 10-18) a condensation of the testimony of eight witnesses, none of which testimony was "material to the questions presented". We find significantly, no reference thereto to the testimony of any of the witnesses called by petitioners Cooper and Stein upon the preliminary examinations as to the voluntariness of their respective confessions.

The extraordinary statements that petitioners "deliberately refused to assist the Judge and Jury in determining whether or not the typewritten confessions of Cooper and

Stein were coerced" (Respdt's Brief, p. 5), and that Wissner "chose to forego his precious right to take the stand and assert his innocence before the trial judge and the jury" (Respdt's Brief, p. 7) reflect a disposition to treat with indifference the fundamental requirement, rooted in tradition, announced by statute, and protected by Constitutional fiat, that an accused person shall not be compelled to testify, and his failure so to do does not create any inference or presumption that may be used against him (United States Constitution, Fifth Amendment; New York State Constitution, Art. 1, Sec. 6; Sec. 393 Code of Criminal Procedure of the State of New York; *People v. Courtney*, 94 N. Y. 490; *People v. Minkowitz*, 220 N. Y. 399; *People v. Manning*, 278 N. Y. 40; *Boyd v. U. S.*, 116 U. S. 616; *Bram v. U. S.*, 168 U. S. 543; *Mason v. U. S.*, 244 U. S. 362). Petitioners individually asserted their innocence by their pleas of "Not Guilty"; nothing more was required.

The views thus expressed by Respondent represent a doctrine, far reaching in its implications, which is not only at variance with established principle, but, coming from an official holding quasi-judicial office, portends a serious threat to other traditional rights.

Distilled to its essence, Respondent's main theme would appear to be that, the petitioners having failed to testify or furnish other *direct* proof of police violence, there is no issue of federal due process before this Court, "whatever circumstantial inferences might be drawn" from the "undisputed affirmative proof" of the "change in Stein's physical condition", as evidenced by the injuries shown (Respdt's Brief, pp. 26-27).

Concededly, there was no testimony of any eye-witness to the beatings which it is contended were inflicted by the State Police. Other than testimony by the victims themselves, there rarely if ever is, and as to such testimony, even in those cases where confessions have been ruled invalid it is apparently more often disregarded or discounted

by this Court than accepted (*Ashcraft v. Tennessee*, 322 U. S. 143; *Malinski v. New York*, 324 U. S. 401; *Watts v. Indiana*, 338 U. S. 49; *Turner v. Pennsylvania*, 338 U. S. 62; *Harris v. South Carolina*, 338 U. S. 68).

The confession chamber, by its nature, is hardly a place where outsiders are suffered to enter freely in order to witness the inquisitorial methods employed by police officers in extracting a confession. The Hawthorne Barracks furnish no exception to the rule, as witness the difficulty experienced even by counsel in gaining admittance (1342, 1349, 1379*).

As for the failure of the petitioners to testify, it has never been our understanding that this Court has set up two standards of due process in testing the validity of a confession: one for those who testify upon the preliminary examination as to its voluntariness, and one for those who do not. That testimony by a defendant has never been deemed a necessary requisite of proof of the involuntary nature of a confession finds compelling support in the fact, as pointed out in this petitioner's Brief (pp. 28-29), that this Court has ruled confessions invalid in cases where it has disregarded claims of police violence, *as testified to by the defendants* (*Watts v. Indiana*, *supra*; *Turner v. Pennsylvania*, *supra*; *Harris v. South Carolina*, *supra*); and, in one case where the Court did refer to such testimony (*Malinski v. New York*, *supra*, 403), the assertion was said to have "such a dubious claim to veracity that we lay it aside". See, also, *Johnson v. Pennsylvania*, 340 U. S. 881, where, on authority of *Turner v. Pennsylvania*, *supra*, this Court granted certiorari, though it disregarded the petitioner's testimony of beatings.

In *Lisenba v. California*, 314 U. S. 219, 238, Mr. Justice BLACK, in dissent, stated:

"I believe the confession used to convict James was the result of coercion and compulsion, and that the

* Figures in parentheses refer, as in petitioner Stein's petition and brief, to pages of the printed record.

judgment should be reversed for that reason. The testimony of the officers to whom the confession was given is enough, *standing alone*, to convince me that it could not have been free and voluntary." (Italics supplied.)

There has been no intimation, in any of the so-called "confession cases" decided by this Court, that the failure of a defendant to testify would, perforce, prevent him from submitting proof of coercion by circumstantial evidence. In any case, the very fact that this Court has not heretofore passed upon the precise question here presented renders the petition in the case at bar one which this Court should review.

As pointed out in this petitioner's petition and brief, the grim total picture conveyed by the record, notwithstanding petitioner's failure to testify, leaves no room for doubt that the circumstances which brought them about were such as to render his confession and prior and subsequent oral statements inadmissible when weighed against the superior commands of due process. Far from relying "on statements, allegations and arguments of counsel" (Respdt's Brief, p. 5), petitioner Stein relies, in addition to the incidence of injury to all three prisoners and the whole unsavory "atmosphere of coercion", on the testimony of Trooper Crowley, Dr. Vosburgh, Warden Allen and John Duff, witnesses called by him upon the preliminary examination, none of whose testimony was considered by the trial Judge, even in submitting the matter of coercion to the jury as a question of fact.

Respondent argues (Respdt's Brief, p. 6) that, the issue of voluntariness having been submitted to the jury "under well-accepted legal principles", this Court will not interfere where "the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary" (*Lyons v. Oklahoma*, 322 U. S. 596, 601). Far from *fairly raising* "the question of whether or not the challenged confession was voluntary", the Court's charge,

incredible as it may seem, completely ignored the testimony of these four witnesses as applied to Stein. Their testimony, constituting the very cornerstone of the attack on the legality of Stein's confession, was effectively withdrawn from the jury's consideration.

As for Respondent's claimed finality of the judgment of the Court below (Respdt's Brief, p. 6), this Court has repeatedly, as in *Lyons v. Oklahoma, supra*, 603 (cited in this connection by Respondent), declared its readiness to intervene, under the mandate of due process, "regardless of the contrary conclusions of the triers of facts, whether judge or jury". Also, *Lisenba v. California, supra*, 226; *Ashcraft v. Tennessee, supra*, 145; *Ward v. Texas*, 316 U. S. 547, 550; *Watts v. Indiana, supra*, 55.

In *Stroble v. California*, 343 U. S. 181, 203, Mr. Justice FRANKFURTER, in dissent, stated:

"When a State court has denied an asserted constitutional right, the State court cannot foreclose this Court from considering the federal claim merely by labelling absence of coercion a 'fact'."

Respondent's Brief refers (p. 25) to the testimony of Captain Glasheen that he "saw no cuts, wounds or bruises on any portion of Stein's person at any time on June 6 or 7", and to the fact that other Troopers "testified that no force or threats were used against Cooper" (Respdt's Brief, p. 19).

Judge LEHMAN, of the New York Court of Appeals, in *People v. Mummiani*, 258 N. Y. 394, 401, referring to denials of police violence, said:

"We are confronted with the proposition of whether the courts must accept helplessly the bare denial of police officers of the accusation of brutality extorting a confession of crime of which the accused may or may not be guilty, without even requiring a full explanation of their conduct * * * though their conduct itself creates grave doubts which mere denial of violence does not allay."

In *People v. Valletutti*, 297 N. Y. 226, 230, the New York Court of Appeals held that the mere denial by the police that the defendant was beaten was not a sufficient accounting for marks and bruises appearing on the person of the defendant:

It is not without significance that Respondent's Brief makes no mention whatever of the important rôle played by Sergeant Johnson, one of the chief interrogators, who was with Stein at various times during the period of his illegal detention, and one of the Troopers in whose custody Stein had been immediately prior to the making of his first oral statement (1908). The District Attorney failed to call Johnson as a witness.

It is begging the question for Respondent to mention (Respdt's Brief, p. 25) that Mrs. Klaus, the stenographer who took Stein's written confession, testified that "no force or violence was used and no promises made during the time she was with defendant taking his confession, * * * (1581-1582)." It has never been contended that the beatings occurred in her presence, while the statement was being taken down. As this Court is well aware, the coercive measures employed to render a suspect impotent of resistance invariably *precede* the taking of the formal written confession.

The various suppositions now advanced by Respondent in attempted explanation for the injuries sustained by the three petitioners represent a decided retreat from the self-infliction theory advanced upon the trial (1246, 1249, 1253, 1258, 1281, 1739-1740, 1810, 2707-2708, 2713), even though, as to Stein, the sole reference to the latter is to be found in the District Attorney's summation (2707-2708). With but a single, passing reference to the possibility of self-infliction (Respdt's Brief, p. 30), in marked contrast to the position taken in the Court of Appeals*, Respondent now stresses, instead, in the case of Stein, the "grip of a strong man" theory, as "a reasonable deduction for the

jury to make * * * (Respdt's Brief, p. 29). Aside from the fact that there was no such testimony, it may not be amiss to point out that Stein was handcuffed the moment he left his brother's apartment, in the custody of the police (1960), and Sergeant Barber testified that he believed Stein was handcuffed when he arrived at the Hawthorne Barracks (2082), and hence there was no occasion for the application of the "grip of a strong man".

While this hypothesis may represent Respondent's current thought, as furnishing a somewhat less implausible avenue of escape from the dilemma presented by the necessity to account for petitioner's injuries, it suffers from the disadvantage of having no basis in the record, and no claim to reality. Certain it is that the bruises to Stein's left arm (1840), as noted by the witness Duff ("area of discoloration and bruises approximately 7 inches long and 4 inches wide") were produced by some agency more compelling than the "grip of a strong man", as were the injuries to other parts of petitioner's body.

In any case, it is clear that, as to Stein, every apologia which the Respondent has advanced, at one time or another, is not only intrinsically false but founded on sheer conjecture, and the duty of the prosecution to explain (*People v. Valleyitti, supra*) has not been met.

As for the claimed failure of Stein to complain, nowhere does Respondent even undertake to discuss the fact that this petitioner did, as stated in his petition herein (p. 15), make detailed complaint in the form of a proceeding brought by him to suppress the confession, under Article

* The following quotation is from the District Attorney's Brief (pp. 116-117) in the Court of Appeals: "Without being able to cross-examine the defendants, how could the People have better answered the inference of violence than they have done here? Must every jail have extra guards held ready to sit in front of the individual cells of confessing prisoners, from the time they are brought in until they are medically examined, to prevent a desperate man from using his shoe or other object on himself in a dark cell-block in an effort to wipe out a confession? Such effort would be fully worth while for a prisoner who knows he might thus save his own life."

charged with any crime (R. 1364); he was held for two and a half days (R. 1371, 1374-5), without sanction of any court or judge (R. 1371), in the course of which detention he was shown, handcuffed, to his son Calman (R. 1372).

The petitioner Cooper was, for 86 hours, held incomunicado, clothed and handcuffed (R. 1353, 1390-2, 1639), in one room 15 by 20 feet (R. 1394), until his arraignment on the night of June 8th.

On June 5th and June 6th he was interrogated by State Troopers working in relays, according to their testimony (R. 1312, 1317; 1361, 1403-4, 2072, 2087, 2103), for a total of twenty hours. At 10:45 P. M. on June 6th he commenced to confess (R. 1459), and signed a typewritten question and answer statement at 2 A. M. on June 7th (R. 1460-1).

Exigencies of space preclude a more extended account, in this brief, of the measures which were visited not only upon Cooper; but upon members of his immediate family who were innocent even of suspicion. A full appraisal of the actions of the State Troopers in their treatment of Cooper, a gross sample of the technique used so insidiously throughout, and its over-all significance as pointing up the methods employed in the arrest, detention and inquisition of the other petitioners, is to be found in the separate brief submitted on Cooper's behalf.

Stein's Arrest.

At 2 A. M. on June 6th petitioner was arrested, without warrant, at the home of his brother Lou Stein, with whom he was residing in New York City, by Detectives Mulligan, Whelan and O'Connor of the New York City Police, accompanied by several Troopers of the New York State Police, all of them attired in civilian clothes (R. 1958-60).

Before being taken from the home of his brother, petitioner requested that John Duff, an attorney with an of-

ffice in New York City, be notified (R. 1687, 1960). Detective Mulligan, the senior officer and spokesman for the arresting group, testified that he knew of Mr. Duff, and knew that he was an attorney, though he did not know him personally³ (R. 1962).

Trooper Crowley, one of the officers accompanying Mulligan, testified that petitioner "wanted to get hold of" Duff (R. 1687). He noticed nothing abnormal about petitioner's arms while petitioner, in his underwear, was washing up (R. 1986-7).

Outside the apartment petitioner was handcuffed, placed in an automobile, driven to a point in New York City where he was transferred to another car without State Police insignia (R. 1699), belonging to one of the State Troopers, and driven to the Barracks of the State Police, at Hawthorne, where he arrived at approximately 3 A. M. that day (R. 1689).

Detective Mulligan, although he admitted "the law says we must book him" (R. 1963), did not book petitioner at any station house in New York City, but, instead, turned him over to the State Troopers (R. 1688, 1963).

Stein's Detention and Interrogation:

The Barracks of Troop K of the New York State Police, at Hawthorne, are located in a secluded, rural section of Westchester County. The buildings are completely isolated, with no surrounding buildings, and no possibility of outcry being heard, or occurrences therein being witnessed by any outsider (R. 1340). The nearest building, a school house, is distant "1000 feet or more" from the Barracks (R. 1340).

³ The first person petitioner asked to be notified, the day after his release from the custody of the State Police, was this same attorney, John Duff (R. 1836, 1846).

For 68 hours petitioner was illegally detained, almost continuously in handcuffs, and, except for repeated questioning, held incomunicado in these Barracks, "under the exclusive control of the police, subject to their mercy and beyond the reach of counsel or of friends" (Mr. Justice Douglas, in *U. S. v. Carignan*, 342 U. S. 36, 39), before being arraigned before a Magistrate at ten o'clock at night on June 8th⁴, during which period of illegal detention a written confession, as well as certain prior and subsequent oral statements, was obtained.

Isolated as are the Barracks, the section thereof in which petitioner was lodged, and the places where questioned (the locker room, in the basement of the Main Building (R. 1691-2, 1905), the Day Room, on the ground floor of the Main Building (R. 1909-10), and the Bureau of Identification Office, 200 feet from the Main Building, across a court yard (R. 1910)), are equally free of supervision from outside sources. There are no detention cells (R. 1639); no sleeping quarters are provided for prisoners or suspects (R. 1369, 1929), and a prisoner must rely upon the generosity of the police for his food (R. 1907, 2010).

Captain Glasheen, in command of the Barracks, testified that he, alone, determines when, if at all, a prisoner eats, sleeps or attends to his personal wants, and he has the arbitrary power to enforce his wishes in those respects, with no supervision from any source whatever (R. 2010-2013).

Glasheen did not know the precise time when petitioner was taken to the locker room, but conceded that it could have been "after his fingerprints were taken early in the

⁴ It is worthy of note that petitioners were arraigned on the evening of the day on which, at 3 P.M., a writ of habeas corpus, obtained by Duff on behalf of Stein in the county where the latter was arrested (New-York), was returnable (R. 2966-2969, Stein's Exhibits EE, FF and GG for identification).

morning of June 6" (R. 1922). He there questioned petitioner from 10 A. M. to 11 A. M. on June 6th, with an armed guard present (R. 1906), at which time petitioner denied any connection with the Reader's Digest crime (R. 1906).

Shortly after 1 P. M., on June 6th, the questioning was resumed by Glasheen, in the locker room, at which time Sergeant Johnson was present, as were other officers and armed guards (R. 1907, 1925). This particular session lasted until 4 or 4:30 P. M., with petitioner still protesting his innocence (R. 1925).

That same day, "around 6:30 that evening" (R. 1926), the questioning was again resumed, in the locker room, this time for a more protracted period, lasting until 2:15 or 2:30 in the morning of June 7th, during all of which time petitioner, then 52 years of age, was kept awake and in handcuffs (R. 1926). The questioning, so intensified, was again conducted by Glasheen, "with other troopers and officers". On this occasion, between 2:15 and 2:30 A. M., Glasheen "read two questions and answers" from Cooper's confession to petitioner (R. 1939, 1954), who still proclaimed his innocence.

Considering the source, the estimate as to the number of hours spent in interrogation of petitioner is certainly not exaggerated. Throughout this entire period of intensive questioning, badgered and beleaguered at the will of his duressors, without the aid of counsel whose assistance he had sought from the moment of his arrest, and without the solace of relatives or friends, petitioner maintained his innocence.

Finally, at about 10 A. M. on June 7th, the contest of attrition came to an end. In response to a message from Trooper Johnson, who had been with petitioner, Glasheen returned to the locker room; at that time, supposedly, peti-

tioner, in the presence of Glasheen and Johnson, made an oral statement implicating himself. Its details were not put in evidence (R. 1908-9).

How long Johnson had been with petitioner does not appear in the record. Neither upon the preliminary examination as to the voluntariness of the confession, or at any time, was Johnson called as a witness by the prosecution; nor was any other Trooper, to account for the 16 of the first 32 hours of petitioner's illegal detention which remained unaccounted for even after Glasheen's testimony.

Although the first oral statement by petitioner was supposedly made some time between 10 and 11 A. M. on June 7th, the written confession, made in the "B. of I." office (R. 1911), was not signed until 4:30 that afternoon (R. 1914). The police stenographer, a former employee of the Reader's Digest Association (R. 1659), testified that the questioning was conducted by Glasheen, with Sergeants Johnson and Sayers present, as was Detective Whelan of the New York City Police during part of the questioning. She testified that there were discussions between the group which she did not take down (R. 1614-21); and that after the questioning was completed she saw petitioner sitting with his eyes closed (R. 1653). Glasheen testified that after the confession was signed, petitioner was given a tray of food (R. 1915).

There were subsequent oral statements testified to by the police. Detective Mulligan testified that at 11 P. M. on June 7th, in a conversation with petitioner, had in the presence of Sergeant Sayers "and other troopers", petitioner referred to Cooper's "putting him into the seat" (R. 2238-9).

Glasheen testified that on June 8th, "shortly before noon", petitioner described to him the clothing he wore on the occasion of the robbery, and, at Glasheen's sugges-

tion, gave Sergeant Manopoli a note to petitioner's brother, directing the latter to turn the clothing over to the bearer of the note (R. 1989, 1991). Neither the note nor any of the articles of clothing were offered in evidence:

Trooper Crowley testified that, on the afternoon of June 8th, petitioner accompanied the witness and Glasheen to the premises of the Reader's Digest, where petitioner supposedly pointed out to them various locations (R. 1704-5).

On June 8th, at about 6:15 P. M., in the presence of the District Attorney, Glasheen, Johnson and "armed guards", petitioner supposedly "identified" the witness Waterbury as the "driver of the truck" (R. 2401, 2917, Respondent's Exhibit 75).

After the arraignment on June 8th, *while still in the custody of the State Police* (R. 2017), petitioner supposedly made a further statement to Glasheen, in the presence of other Troopers, which statement was in the nature of a clarification as to the use of the truck employed in the robbery (R. 1996).

Counsel's Search for Stein.

It is undisputed that, at the time of his arrest, petitioner requested that John Duff, the attorney, be notified (R. 1687, 1960). Petitioner's brother complied by phoning the attorney at the latter's home at 7:20 A. M. June 6th (R. 1828).

Duff testified to the efforts he made to locate petitioner, efforts which were unavailing because of the fact that petitioner was taken into custody by Detectives Mulligan, Whelan and O'Connor of the New York City police, accompanied by other officers dressed in civilian clothes, whose identities were then unknown, and that he (the witness) "had every reason to believe that he [petitioner] was in the custody of the New York City police, because he had

been arrested by a New York City detective, Mulligan" (R. 1850).

Though there was some question, occasioned by the affirmative assertion of Detective Mulligan, whether, despite the veil of secrecy thrown about the movements of the police in this case, petitioner's brother was advised of petitioner's destination and the identity of the State Troopers (R. 1960), we submit that the undisputed proof in the record establishes, without substantial challenge, that he was not, as witness the fact that Dorfman and Wissner had not, at the time, been apprehended (R. 2019), and petitioner's brother, who was not detained, would have been free to disclose to those not yet apprehended information which had, up to that time, been a closely guarded secret (R. 155).

In addition to inquiring at various station houses in New York City, at Police Headquarters in New York City, at the Felony Court in the Borough of Manhattan of the City of New York and at the office of the Police Commissioner, Duff sought to communicate personally with Detective Mulligan, but without success (R. 1829).

Finally, on June 8th, Duff sued out a writ of habeas corpus, returnable at three o'clock that afternoon in New York County (R. 2968; petitioner's Exhibit FF for identification). At ten o'clock that night all three petitioners were arraigned before a Magistrate in Westchester County, after, in the case of Cooper, 86 hours of illegal detention; in the case of Stein, 68 hours of illegal detention, and, in the case of Wissner, the non-confessing defendant, 38 hours of illegal detention.

It was established that the judge before whom petitioners were arraigned had been available, during the period of petitioners' detention, "24 hours a day", "at any time or any hour, around the clock" (R. 1270).

Wissner's Arrest and Detention.

Following the revealed pattern in the cases of Cooper and Stein, Wissner was arrested on June 7th, at about 9 A. M., in New York City (R. 1320, 1325), and taken to the Hawthorne Barracks, without being booked at any station house in New York City. His wife was arrested with him and taken to the same State Police Barracks (R. 2300, 2311). That night she was obliged to sleep, fully clothed, on a bare mattress, on the floor of the Barracks (R. 1656-7). On June 8th, at about nine or ten o'clock at night (R. 1661), she was released, but only after the State Police had exacted from her, as a condition of her liberation, a release (R. 1376, 2960, Wissner's Exhibit S) absolving Sergeant Sayers, of the State Police, from any liability "by reason of any interference with my person or liberty". This was admittedly the "usual" practice of "members of the Troop, from the Inspector down" (R. 2251), and had the approval of Sayer's superiors (R. 2256).

Wissner was held incommunicado, and interrogated at length during the 38 hours of his illegal detention; he made no confession.

Dorfman's Surrender and Treatment.

Dorfman, the accomplice, accompanied by an attorney, surrendered to the District Attorney on June 19, 1950 (R. 659, 664), after having first taken the precaution of having his body examined and photographed by a physician (R. 656). While the attorney was in the act of conferring with the District Attorney, the State Troopers proceeded to spirit Dorfman away, from the District Attorney's office, to the confined privacy of the Hawthorne Barracks (R. 716-7). While there, and before being arraigned that evening, he was "pushed around" (R. 655), and was con-

tinuously questioned for nine hours (R. 657); his only food consisted of a dry bologna sandwich and coffee, just before being taken to court (R. 658).

The Injuries.

Shortly before midnight on June 8th the State Police lodged the three petitioners in the County Jail (R. 1273, 1858, 2517-8). Apart from the short period of time consumed in arraigning them before the Magistrate, they had been held incommunicado, separate and apart from each other, from the times of their respective arrests.

Early on the morning of June 9th the jail physician, Dr. Vosburgh, examined the three petitioners, each of whom was brought to the doctor's clinic *alone*, from distantly separated parts of the jail. No other prisoner was present when the doctor examined each one individually (R. 1860-1).

On Wissner, the first to be examined, he observed bruises on the left side of the chest. The fifth rib on the left side was broken, according to Dr. Vosburgh's record of June 9th (R. 3011, Exhibit PPP); the x-ray report of June 12th, however, showed that it was the sixth rib (R. 2957, Exhibit R), a revealing commentary on the trustworthiness of Dr. Vosburgh's records. There were abrasions of both shins, bruised areas on the thighs, the left side of the abdomen and the buttocks, and a bump on the head (R. 2954, Exhibit R. 3011-2, Exhibit PPP).

On Stein, next to be examined, the doctor's report showed multiple bruises "in the left upper arm, between the elbow and the shoulder" (R. 1713, 2909-10, Respondent's Exhibit 65). The witness Duff examined petitioner Stein the same day, at about 3 P. M. (R. 1838), and made a record, in shorthand, of his observations, which record was produced upon the trial (R. 1840, Stein's Exhibit HH for iden-

tification). He observed that "there were bruises on the left arm, his right arm and the left lower ribs below the breast" (R. 1839). Duff observed and made note of the dimensions of the bruises, as follows: "The left arm, area of discoloration and bruises, approximately 7 inches long and 4 inches wide. Right arm, above the elbow, discoloration and bruises about 3 inches long and 1 inch wide. Left lower chest, second, third and fourth ribs, from the floating ribs to the left and below left breast, black and blue marks in area approximately 3 by 4 inches" (R. 1840).

On Cooper, the last of the three to be examined by Dr. Vosburgh on the morning of June 9th, the latter found "bruises on the left posterior lateral chest, abdomen, in the right bicep area, and on both buttocks" (R. 1237-9, 2971, Exhibit BBB).

Thomas J. Todarelli, a member of the New York Bar, testified to extensive injuries which he and two other attorneys observed and measured on the person of Cooper on June 10th (R. 1260-3). His description supplements that of the jail physician, just as Duff's observations and notations supplement the doctor's record of Stein's injuries.

A week later Duff again examined Stein, and observed that "The bruise marks on the left arm were faintly discernible (sic), those on the left arm were not as pronounced as on the first occasion when I observed them on June 9, but they were still clearly noticeable. The bruises in and about the ribs were still clearly noticeable" (R. 1841).

The prosecution did not question this witness concerning the injuries which he described, and, in fact, conceded that he would not commit perjury (R. 1845). On summation the District Attorney frankly stated that he did not

question the witness' observations, but sought to account for the injuries described by him on the theory of self-infliction (R. 2707-8).

The Complaints.

"We have now reached the final chapter of this unedifying story in the administration of criminal justice" (*Hysler v. Florida*, 315 U. S. 411, 415). On June 16th Stein personally entered a plea of Not Guilty to the original indictment⁵, and requested that counsel be assigned to represent him (R. 1848-9). Though Duff was present on that occasion, he emphasized that he was there "to note" his "withdrawal" (R. 1848), although it is undisputed that, despite the witness' use of the term "withdrawal", he had never appeared in Court on behalf of petitioner, but had merely filed an "informal notice of appearance" (R. 1838), in which it was stated that he "expected" that he "would be retained as attorney" (R. 1846), which "informal notice of appearance" was required of him by the District Attorney before he was permitted to interview petitioner at the County Jail (R. 1838).

No assignment of counsel was made until July 24, 1950 (R. 14-15); after which assignment detailed complaint was made on August 29, 1950, in the form of a proceeding instituted in the Supreme Court of Westchester County, under Article 78 of the New York Civil Practice Act (R. 1842-3, 1856, Exhibit II for identification), to suppress his confession upon the ground that the same had been obtained during a period of illegal detention, after prolonged questioning, and by means of police violence and coercion, all in violation of his constitutional rights. Petitioner's sup-

⁵ A superseding indictment was filed on June 30, 1950 (R. 8).

porting affidavit set forth in detail the acts complained of.⁶ The proceeding was dismissed, upon the ground that "Whether the confession was voluntary or not can be tried at the trial by the jury. Their determination will indicate whether the grave charges made against the police are true, and that determination will indicate the course then to be pursued".⁷

No other method is provided in New York State whereby a defendant who claims that his confession was an involuntary one can himself give sworn proof of what took place in the confession chamber, without being compelled to testify, and thus subject himself to questioning on the principal crime charged in the indictment, before the very jury which is trying the ultimate question of his guilt or innocence.

The procedural risks which beset a defendant who would be heard on the question of the voluntariness of his confession are a deterring consideration. There is no provision for trying the issue out of the hearing of the jury, as is the case in the federal courts, as well as in many state jurisdictions. Under the procedure in New York State a defendant who would contest the validity of his confession is confronted with a dilemma choice which is at conflict with the spirit of the privilege against self-incrimination.

⁶ As contained in Exhibit II for identification, it recites that at the time of arrest Detective Mulligan and Trooper Crowley promised to notify petitioner's lawyer, Duff; that after arrival at the Hawthorne Barracks, and until he confessed, petitioner was repeatedly punched and kicked by different Troopers; that he was compelled to remain awake; that he was refused food; that he asked for his lawyer on numerous occasions, and each time was kicked and told that he could not see him, that he was police property, and that if he continued to "holler" for his lawyer the Troopers would kill him. He was told that his sweetheart was being detained, and that she would be released only when he had confessed.

⁷ Order of Mr. Justice Schmidt, Justice of the New York Supreme Court, Westchester County, which appeared in the New York Law Journal of September 15, 1950.

It should be noted that there were, concededly, also six formal complaints made on behalf of Cooper and two on behalf of Wissner, by the attorneys, on the dates and in the manner noted:

June 10 Attorney Sabbatino, to Deputy Warden Allen (R. 1882),

June 10 Attorney Sabbatino; by telephone, to District Attorney Fanelli (R. 1228-9),

June 10 Attorneys Sabbatino, Todarelli and Reisner, by telegram, to District Attorney Fanelli (R. 1232, and Exhibit CCC for identification, R. 2973),

June 10 Attorney Todarelli, to County Court, Westchester County (R. 2974-83; Exhibit DDD for identification),

June 15 Attorney Todarelli, to County Court, Westchester County (R. 2982),

June 16 Attorney Goldstein, to County Court, Westchester County (R. 1873-4),

June 16 Attorney Goldstein, to Supreme Court Justice Flannery of Westchester County (R. 1873-4),

June 16 Attorney Todarelli to Supreme Court Justice Flannery of Westchester County (R. 2984-96; Exhibit FFF for identification).

These complaints of police violence, the announced purposes of which were to bring about further examination by an outside physician and to cause an inquiry to be made into the conduct of the State Police in this case, resulted in neither a re-examination of petitioners or an inquiry into the actions of the State Troopers.

Argument

Notwithstanding that the jury and the Appellate Court below have resolved against petitioner the question of voluntariness in connection with the manner in which his confession and prior and subsequent oral statements were

obtained, we respectfully submit that this Court is not bound thereby, but is under the duty of making an independent determination on the undisputed facts. (*Haley v. Ohio*, 332 U.S. 596, 599; *Malinski v. New York*, 324 U.S. 401, 404, and cases cited; *ibid*, 438; *Stroble v. California*, 343 U.S. 181, 189).

Aside from the undisputed proof of serious physical injuries to all three petitioners, injuries which bespeak a course of violence only exceeded by the brutalities which were rife in the Elizabethan era, the agglomerate of facts points, in overwhelming measure, to an atmosphere which was "inherently coercive". The undisputed facts in the record constitute a searing indictment of the lawless conduct of the New York State Police and the criminally repressive methods regularly and systematically employed by them. The extortion of a release from Wissner's wife, as a condition of her liberation from a detention which was illegal from its inception, to take but one example, is perhaps best epitomized in the phrase "insolence of office". Adding extortion and chicanery to their other excesses, there were apparently no depths to which the New York State Police were unwilling to descend in this case. This is harsh judgment, it is true, but the record supports it. In these deeply trouble times, when the survival of our way of life is at stake, such cynical disregard of the rights and dignities of free men constitutes a potent threat from within. To equate the methods used with "voluntariness" is to reject the whole concept of due process expressed by this Court.

Respondent has urged upon this Court (Respondent's brief in opposition to petitions for writs of certiorari, pp. 4-7, 33-4, 41, 48) that the failure of petitioner to testify upon the preliminary examination or furnish other direct proof of police violence, coupled with the fact of denials by the police, is decisive on the issue of due process. We

feel that the question is one of such importance, not only to the decision of this cause but to the body of federal law, as to require the fullest treatment in this brief.

Concededly, there was no testimony of any eyewitness to the beatings which it is contended were and could only have been inflicted by the State Police. Other than testimony by the victims themselves, there rarely if ever is, and as to such testimony, even in those cases in which confessions have been ruled invalid it is apparently more often disregarded or discounted by this Court than accepted (*Ashcraft v. Tennessee*, 322 U. S. 143; *Malinski v. New York*, *supra*, 403; *Watts v. Indiana*, 338 U. S. 49; *Turner v. Pennsylvania*, 338 U. S. 62; *Harris v. South Carolina*, 338 U. S. 68).

The confession chamber, by its nature, is hardly a place where outsiders are suffered to enter freely in order to witness the inquisitorial methods employed by police officers in extracting a confession. The Hawthorne Barracks furnish no exception to the rule, as witness the difficulty experienced even by counsel in gaining admittance (R. 1342, 1349, 1379).

As for the failure of the petitioners to testify, it has never been our understanding that this Court has set up *two* standards of due process in testing the validity of a confession: one for those who testify upon the preliminary examination as to its voluntariness, and one for those who do not. That testimony by a defendant has never been deemed a necessary requisite of proof of the involuntary nature of a confession finds compelling support in the fact that this Court has ruled confessions invalid in cases where it has disregarded claims of police violence, *as testified to by the defendants* (*Watts v. Indiana*, *supra*; *Turner v. Pennsylvania*, *supra*; *Harris v. South Carolina*, *supra*), and, in one case where the Court did refer to such testimony (*Malinski v. New York*, *supra*, 403), the assertion was said

to have such a dubious claim to veracity that we lay it aside". See, also, *Johnson v. Pennsylvania*, 340 U. S. 881, where, on authority of *Turner v. Pennsylvania*, *supra*, this Court granted certiorari though it disregarded the petitioner's testimony of beatings.

There has been no intimation, in any of the so-called "confession cases" decided by this Court, that unless a defendant testifies it is futile for him to introduce proof of police violence of the character introduced in the case at bar.

The factor of violence, even in the absence of direct proof, is implicit throughout this case. The testimony of Trooper Crowley, Deputy Warden Allen, Dr. Vosburgh and John Duff, witnesses called by petitioner upon the preliminary examination, to say nothing of the damning circumstance of injuries *to all three petitioners*, points unmistakably to a studied course of police savagery unparalleled in the reported cases of this Court. In the face of the bruises appearing on the body of petitioner on the morning of June 9th, bruises which were not present at the time of his arrest on June 6th, how can it possibly be said that petitioner was not beaten during the period of his illegal detention in the Hawthorne Barracks?

Putting to one side the controverted evidence, and taking only the undisputed testimony, we have the following sequence of events. At 2 A. M. on June 6th petitioner was arrested at the home of his brother (R. 1958). Before being taken from the apartment, he washed up, while clad in his underwear (R. 1986). At that time Trooper Crowley observed nothing abnormal about petitioner's exposed arms (R. 1987). From the moment of his arrest he was continuously in the custody of the State Police until about midnight June 8th, when he was lodged by them in the County Jail (R. 4273). Early the next morning he was

examined by the jail physician, that afternoon by a lawyer for whom he had sent, both of whom were in agreement as to the multiple bruises found in the area of the left arm of petitioner, between the elbow and the shoulder. The attorney's examination, a more thorough one, we submit, disclosed numerous other bruises on various parts of petitioner's body (R. 1840-1).

If this undisputed evidence, this panorama of events does not at least "suggest that force or coercion was used to exact the confession" (*Haley v. Ohio*, *supra*, 599), then, we respectfully submit that the term has lost its meaning.

Any remaining doubt as to the measures visited upon petitioner by the State Police is dispelled, beyond possibility of refutation, by the undisputed fact of the injuries appearing on the bodies of *all three petitioners* almost immediately after their release from the custody of the State Police. This proof of physical injury, so tellingly portrayed even by the admittedly incomplete recorded entries of a county official who was definitely a hostile witness, leads to but one inevitable conclusion, namely, that the confession of petitioner was "coercion's product", as was the confession of Cooper, their failure to testify or furnish other direct proof notwithstanding.

The duty of the prosecution "satisfactorily to account" (*People v. Valletutti*, 297 N. Y. 226, 230) for these injuries was not conditional upon the petitioner's having first testified or offered other direct proof of police violence. In token acknowledgment of that rule, the prosecution has undertaken, at different times and in different ways, and with a somewhat bewildering variety of hypotheses, to explain the manner in which the injuries to these three petitioners were sustained.

In all the multiplicity of theories put forward, the one which was common to all three petitioners was the self-in-

fiction theory advanced upon the trial (R. 1246, 1249, 1253, 1258, 1281, 1737-40, 1810, 2707-8, 2713), even though, as to Stein, it was advanced for the first time in the course of the prosecutor's closing remarks to the jury: "I am not saying that Mr. Duff is not telling the truth; but Dr. Vosburgh said that those injuries could have been self-inflicted" (R. 2707-8). Actually, Dr. Vosburgh never so testified as to Stein. Though the explanation is, on the face of it, so patently unreal and fantastic, we nevertheless feel constrained to point to one undisputed fact which disposes, with devastating finality, of the prosecution's whole specious attempt to so account for the injuries received by the three petitioners. Wissner, *the non-confessing petitioner*, bore the most aggravated injuries. He had no confession to explain away; and yet the prosecution argued, before the jury and the Appellate Court below that he inflicted these injuries upon himself, while Cooper and Stein, in distantly separated parts of the County Jail, were performing similar rites of self-flagellation. The utter absurdity of the theory is rendered self-evident by the nature of the injuries, injuries which appeared all over the petitioners' bodies, even on such portions of the body as the buttocks (R. 3012, 2971).

Equally bizarre was the other theory advanced as to Stein, founded upon the answer to a hypothetical question put to Dr. Vosburgh, not based upon any evidence in the case, that the injuries which petitioner sustained could have been inflicted by the "grasp" of a "strong, healthy officer with a strong grip" (R. 1740). Aside from the fact that there was no such testimony, it may not be amiss to point out that Stein was handcuffed the moment he left his brother's apartment, in the custody of the police (R. 1960), and Sergeant Barber testified that he believed Stein was handcuffed when he arrived at the Hawthorne Bar-

racks (R. 2082), and hence there was no occasion for the application of a "strong grip". The explanation suffers from the disadvantage of having no basis in the record and no claim to reality. Certain it is that the bruises to Stein's left arm (R. 1840), as noted by the witness Duff ("area of discoloration and bruises approximately 7 inches long and 4 inches wide") were produced by some agency more compelling than the grip of a strong man, as were the injuries to other parts of petitioner's body.

It is only fair to add, in connection with the injuries sustained by petitioner, that both Glasheen and Sergeant Barber testified that not a hand was laid on him (R. 1914, 1931-2, 1149, 2083), but it is also true that charges of police brutality, even where supported, as in the case of petitioners, by incontestable proof, inevitably evoke denials by the police, denials which have become a shopworn stereotype.

"As is usual in this type of case the deputies say that the confession was wholly 'voluntary'; . . . (Mr. Justice Black, dissenting, in *Gallegos v. Nebraska*, 342 U.S. 55, 74).

It would be the height of naiveté to expect these officers to admit under oath to the commission by them of a serious crime. Certainly the members of this Court are not, like so many cloistered academies, so removed from everyday reality as to expect petitioners to prove acts of police brutality *out of the mouths of the very perpetrators of such acts.* In the light of the undisputed proof of physical injury to all three petitioners, their denials are meaningless.

Judge Lehman, of the New York Court of Appeals, in *People v. Mummiani*, 258 N.Y. 394, 401, referring to denials of police violence, said:

"We are confronted with the proposition of whether the courts must accept helplessly the bare denial of

police officers of the accusation of brutality extorting a confession of crime of which the accused may or may not be guilty, without even requiring a full explanation of their conduct . . . though their conduct itself creates grave doubts which mere denial of violence does not allay."

It is, of course, petitioner's contention, as it was upon the trial and upon appeal to the Court below, that the confession and prior and subsequent oral statements should have, in the first instance, been ruled invalid by the Trial Court *as a matter of law*, and the matter of their voluntariness not submitted to the jury as a question of fact (*People v. Barbato*, 254 N.Y. 170). Even as a question of fact, however, the matter was never submitted to the jury "under proper instructions" (*Gallegos v. Nebraska*, *supra*, 58). Not a single reference was made by the Court, in its charge, to the testimony of any of the four witnesses (Trooper Crowley, Deputy Warden Allen, Dr. Vosburgh and John Duff) called by petitioner upon the preliminary examination. Their testimony, constituting the very cornerstone of the attack on the legality of Stein's confession, was effectively withdrawn from the jury's consideration.

It may be said without overstatement that the conceded and proven facts in the instant case disclose a situation more flagrant and indefensible than was shown in any of the cases cited in this brief, for we have not only those determining factors which were present in *Ashcraft v. Tennessee*, *supra*, *Malinski v. New York*, *supra*, *Watts v. Indiana*, *supra*, *Turner v. Pennsylvania*, *supra*, and *Harris v. South Carolina*, *supra*, namely, the many hours of intensive interrogation, plus the illegal detention, but, *in addition*, that which was not present in any of the cases cited—*undisputed and indisputable proof of injuries sustained by all three petitioners*. This one factor, absent

from *Ashcraft* and its companions, demands their application on an *a fortiori* basis.

When the combined factors of illegally delayed arraignment, holding of petitioner incommunicado, intensive interrogation and physical injuries all appear in one case, *as in no other case decided by this Court*, the necessity for corrective action is, we respectfully urge, apparent.

As heretofore pointed out, in addition to the proceeding brought by Stein to suppress his confession under Article 78 of the New York Civil Practice Act, six separate complaints of police violence and of the inadequacy of the examinations made by Dr. Vosburgh were made on behalf of Cooper and Wissner. As might be expected of one who had given *carte blanche* to the State Police in this case, the District Attorney took a position on these various complaints which is appropriately expressed in the boast of Assistant District Attorney O'Brien, made upon the trial, that two of the complaints, in the form of applications to the Supreme Court of Westchester County, then under discussion, were not only opposed, but opposed "Vigorously, your Honor" (R. 1874). Making due allowance for zeal in advocacy, it is disillusioning to find this same assistant district attorney, who "vigorously" opposed the applications *in June*, unctuously asking the Court, *in December*, to rule that the defendants "are at liberty to call any physicians, if they so desire as to their physical condition" (R. 1798).

The Inexcusable Delay in Arraignment

It was conceded that the arraignment of all three petitioners was wilfully and wrongfully delayed in violation of the statutes (Sec. 465 Code of Criminal Procedure of New York State; See, 1844 Penal Law of the State of New

York). The Trial Court eventually so determined as a matter of law, as an afterthought at the end of its charge, although in the body of the charge the Court had first erroneously left it as a question of fact for the jury.

Although no time is stated, it is nevertheless implicit in such statutes that the arresting officer must act promptly and without unnecessary delay (*McNabb v. United States*, 318 U.S. 322).

There may be situations where delay is unavoidable, such as inability to locate a magistrate, or illness of the prisoner. As heretofore pointed out, a magistrate was available during every hour of the 68 hours of this petitioner's illegal detention (R. 1270)..

Were this a case arising in the federal courts there could be no doubt that the confession and prior and subsequent oral statements of petitioner could not stand against the rule of *McNabb v. United States*, supra, which forbids inexcusable detention for the purpose of extracting evidence from an accused, irrespective of actual coercion. Yet, since *McNabb*, in cases arising from state courts under the Fourteenth Amendment, *Ashcraft v. Tennessee*, supra, and *Malinski v. New York*, supra,⁸ this Court has set aside convictions obtained by the use of confessions extracted after prolonged detention, coupled with intensive interrogation.

It is true that in *Malinski* there was the additional element of coercion in the form of threats of violence. Though the petitioner there claimed that there was, in fact, actual violence, this Court attached no weight to the claim.

In both cases there was proof of illegal detention, plus the usual concomitant of continuous questioning, and, in

⁸ In *Ashcraft* the accused was detained by the police for 36 hours before being granted a preliminary hearing. In *Malinski* a confession obtained after ten hours detention was ruled invalid.

the case of *Malinski*, the added element of admitted threats, but without proof of physical mistreatment.

"There was no visible sign of any beating such as bruises or scars" (*Malinski v. New York*, *supra*, 403).

Even apart from the elements of physical injury and continuous interrogation, both here present, there is certainly considerable support for the belief that the right to a prompt preliminary hearing is such an "impressively pervasive requirement of criminal procedure" (*McNabb v. United States*, *supra*, 343) that it must be considered among "the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'" (*Herbert v. Louisiana*, 272 U. S. 312, 316).

Even if such a conclusion would seem to extend the implications of this Court's decisions and "the effect of a mere denial of a prompt examining trial is a matter of state, not of federal law" (*Lyons v. Oklahoma*, 322 U. S. 596, 597, n. 2), still it is clear that the fact of prolonged detention will be considered as affecting the voluntary nature of a confession (*Lyons v. Oklahoma*, *supra*; *Haley v. Ohio*, *supra*).

We are not unmindful that the mere fact that a confession was made while in the custody of the police does not render it inadmissible (*McNabb v. United States*, *supra*, 346). It is, however, a circumstance to be considered, as is the fact of an extended delay in arraignment, the holding of a prisoner incommunicado, without opportunity to see counsel or friends (*Ward v. Texas*, *supra*; *Malinski v. New York*, *supra*), and subjecting him to long and gruelling questioning (*Baril v. Texas*, 316 U. S. 547; *Watts v. Indiana*, *supra*). All of these elements are here present, with the additional undisputed one of physical injuries.

Although the District Attorney cannot be unaware that it is the law of this case that the arraignment of all three-

petitioners was unnecessarily delayed, in violation of the positive mandate of the statutes, he nevertheless has attempted, throughout, to justify the delay because of "the problem confronting the State Police . . ." (Respondent's brief in opposition to petitions for writs of certiorari, p. 34). His strained effort at extenuation amounts to a contention that, having delayed the arraignment of Cooper and Stein in order to extract from them confessions, their arraignment could be still further delayed so as to facilitate the arrest of others named in the confessions, and again delayed during the interrogation of one of the persons so named, after his arrest.

On June 8th, before his arraignment late that night, the only "problem confronting the State Police" was the fact that Wissner had not confessed. Time was running out, and so, unable to operate at their leisure, and with a mastery of the art of persuasion which was something less than perfect, these crude practitioners inflicted upon Wissner injuries more serious than those sustained by either of the other two petitioners.

It reflects no credit on the District Attorney of Westchester County that, as he testified, he became aware on the afternoon of June 6th that Cooper had been in custody in the Hawthorne Barracks since the morning of June 5th (R. 1225). Notwithstanding this knowledge, he not only made no complaint "about the failure of the arresting officers to arraign Cooper Monday night at the court provided for that purpose in Newcastle" (R. 1227), but, with ostrich-like indifference, stood complacently if not approvingly by, absenting himself from the Barracks until after the written confessions of Cooper and Stein had been obtained. He appeared at the arraignment which followed late on the night of June 8th. By a not altogether peculiar coincidence, the arraignment was held on the night of the

very day that a writ of habeas corpus had been sued out on behalf of Stein.

In this instance, as in the case of the resistance which he offered to the complaints of police violence, the District Attorney did nothing to dispel the impression of his complete abdication to the State Police in this case.

Petitioner's Subsequent Oral Statements

Subsequent to the written confession, there were supposedly five oral statements or incriminating acts of petitioner. These statements and acts, we submit, are entitled to no greater consideration than the written confession or the prior oral statement, for they suffered from the same infirmities which rendered the others invalid.

Petitioner, at the time of these subsequent statements and acts, was still in the custody of the State Police; he was still without the aid of counsel whom he had sought from the moment of his arrest; he was still without the solace of relatives or friends, and was still suffering from injuries already inflicted by the State Police.

The principle we here invoke is that stated by this Court in *Malinski v. New York*, *supra*, 428:

“A man once broken in will does not readily, if ever, recover from the breaking.”

Also, at pp. 425-6:

“No one else except his prisoners was allowed to see him at any time.”

Also, at p. 429:

“. . . a series of confessions, of which the first is the creative precursor of the later ones.”

Even if the later statements or acts were lawfully obtained, the prior confession or statement having once “in-

feeted the trial, the verdict of guilty must be set aside no matter how free of taint the other evidence may be" (*Stroble v. California*, 343 U. S. 181, 204; *Malinski v. New York*, *supra*, 433).

Conclusion

The right to due process stands foremost among the rights which the founding fathers carved out of the English Petition of Right. We respectfully urge that to place this Court's seal of approval, even tacitly implied, upon the manner in which these confessions were obtained would not only be a denial of this ancient and traditional right, but would serve to enthrone police brutality throughout the land. Secure in the knowledge that precisely such odious practices as we have outlined have been noted with indifference, if not sanctioned, by the highest Court in the land, police officers could then, and assuredly would, with impunity, make of these evil tactics the standard procedure in obtaining confessions.

The shocking practices resorted to by the police in this case cannot be squared with the decisions of this Court to which we have referred. When illegally delayed arraignment, holding of petitioner incommunicado, intensive interrogation and undisputed proof of brutal beatings all occur in one case, the accumulated enormity of the error is such that, upon the tainted product of such official misconduct, your petitioner cannot, with justice, be sent to his death.

Respectfully submitted,

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APPENDIX

Penal Law of the State of New York, Sec. 1044:

“The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

“2. . . . without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise;”

Penal Law of the State of New York, Sec. 1844:

“A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.”

Code of Criminal Procedure of the State of New York, Sec. 165:

“The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night. As amended L. 1882, c. 360, Sec. 1; L. 1887, c. 694.”

Title 28 U. S. Code, Sec. 1257:

“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

“(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.”

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Nos. 15, 16 and 24 Miscellaneous.

CALMAN COOPER, HARRY A. STEIN and
NATHAN WISSNER,

Petitioners,
against

THE PEOPLE OF THE STATE OF NEW YORK,
v.
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1952.

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CALMAN COOPER, HARRY A. STEIN and NATHAN WISSNER,
Petitioners,
against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITIONS FOR WRITS OF CERTIORARI.**

Statement.

All of the petitioners seek a review of the judgments of the County Court of Westchester County, State of New York, entered on December 27, 1950, sentencing them to death. These judgments were entered upon the verdicts of a jury rendered in said Court on December 21, 1950, finding all of the defendants guilty of the crime of murder in the first degree as defined by that portion of Subdivision 2 of Section 1044 of the Penal Law of the State of New York commonly known as "felony murder". Under the mandate of Section 1045 of the New York Penal Law perpetrators found guilty of this crime must be punished by death unless the jury, as part of its verdict, recommend that such defendants be imprisoned for the terms of their natural lives. (cf. Sec. 1045-a New York Penal Law.)

The jury in the case at bar made no such recommendation as to any of the petitioners (2792). (Numerals in parenthesis in this brief refer to the pages in the certified Record on Appeal to the New York Court of Appeals pursuant to the provisions of Subdivision 3 of Rule 27 of the Rules of the United States Supreme Court.)

The joint jury trial of the three petitioners consumed some seven weeks, having commenced on November 1, 1950, and terminated on December 21, 1950.

On March 6, 1952, the seven Judges of the New York State Court of Appeals unanimously affirmed the judgments of conviction as to all of the petitioners. (*People v. Cooper, et al.*, 303 N. Y. 856. Official Edition, Weekly Advance Sheets, April 5, 1952). No opinion was handed down by the Court of Appeals.

On April 18, 1952, the Court of Appeals entered an order on motion of the petitioners herein amending the remittitur to read as follows:

“Questions under the Federal Constitution were presented and necessarily passed upon by this Court, viz:

(1) whether the admission in evidence of the confession of the defendant Cooper violated his rights under the Fourteenth Amendment to the Constitution of the United States;

(2) whether the admission in evidence of the confession and the prior and subsequent oral statements of the defendant Stein violated his rights under the Fourteenth Amendment of the Constitution of the United States;

(3) whether the admission in evidence of the confessions of the defendants Cooper and Stein violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the United States;

(4) whether the refusal to sever the trial of the defendant Wissner from that of the defendants Cooper and Stein violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the United States;

(5) whether the refusal of the trial judge to delete from the confessions of defendants Cooper and Stein all references therein made to the defendant Wissner as a participant in the crime violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the United States. This Court held that the rights of the defendants under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied."

On April 7, 1952, Mr. Justice Jackson of this Court granted a stay of execution of the death sentences pending a determination of the present applications.

Questions Presented.

(A) By Petitioner, Calman Cooper.

(1) Cooper contends that the admission in evidence of his confession (Peo. Ex. 59, 1521-2874) admitting his participation in the hold-up and robbery of the money truck owned and operated by The Readers Digest Association at Chappaqua, Westchester County, New York, on April 3, 1950, during which robbery Andrew Petrini was shot and killed by the petitioner, Nathan Wissner, acting in concert with Cooper and Stein, violated Cooper's rights under the due process clause of the Fourteenth Amendment of the Constitution of the United States (Petition, pp. 3-4).

(2) Cooper also complains that the Trial Court refused to instruct the jury to state specifically, in reporting its verdict, whether the jury found his confession to be voluntary (Petition, p. 4).

Questions Presented.

(B) By Petitioner, Harry A. Stein.

Stein contends that the admission in evidence of his confession (Peo. Ex. 64, 1968-2896) and his oral statements prior and subsequent thereto, violated his rights under the due process clause of the Fourteenth Amendment.

Questions Presented.

(C) By Petitioner, Nathan Wissner.

(a) Wissner contends that the admission in evidence of the Cooper and Stein confessions deprived him of his right to due process guaranteed by the Fourteenth Amendment.

(b) This petitioner also urges that the refusal of the Trial Judge to delete all references to his participation in the felony murder from the Cooper and Stein confessions also deprived him of due process.

Jurisdiction.

The People of the State of New York urge that jurisdiction of this Honorable Court is totally lacking as to all of the petitioners under United States Code, Section 1257, Subd. 3 and under Rule 38, Subd. 5(a) of the Supreme Court rules for the following reasons:

(1) The confessions of the petitioners, Cooper and Stein, were lawfully obtained under New York

law, (Sec. 395, N. Y. Code of Criminal Procedure) and in accordance with the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution, and in harmony with the well considered decisions of this Court and of the New York Court of Appeals.

(2) Not one of the three petitioners testified at the trial at which they were all found guilty of Murder in the first degree, resulting in the judgment of death being imposed upon all of them. The jury did not recommend life imprisonment as it might have under Section 1045-a of the New York Penal Law.

By such failure to testify before the Trial Judge and Jury, the three petitioners, all represented by able counsel, deliberately refused to assist the Judge and Jury in determining whether or not the typewritten confessions of Cooper and Stein were coerced. Instead, they choose to rely on statements, allegations and arguments of counsel at the trial and in the briefs to this Court on this application, all of which, of course, do not meet the requirements of legal proof. Innuendo and surmise are offered as substitutes.

(3) Not one other witness appeared on behalf of any of the three petitioners at their trial who testified that any one of them had been beaten, threatened, coerced or intimidated in any manner by the New York State Police or the New York City Police or anyone else from the time of their arrests until the typewritten confessions of Cooper and Stein were taken and executed by these petitioners at the Headquarters of the New York State Police in Westchester County, New York, the County in which the three petitioners participated in the robbery of the money truck owned and operated by The Readers Digest Association which resulted in the felony

murder of Andrew Petrini, an unarmed messenger on the truck.

Petrini had been shot through the head by the petitioner, Wissner, without warning, at the beginning of the holdup, within a few moments after another truck driven by the petitioner, Cooper, and in which the petitioner, Stein, was riding with Wissner and the accomplice Dorfman, cut off the Readers Digest money truck on a private road on the Readers Digest property in Westchester County on April 3, 1950 and brought it to a halt. The petitioner, Wissner, lay in wait at this rendezvous by prearrangement with Cooper and Stein. Wissner used an automatic pistol in murdering Petrini. Stein was armed with a revolver. No resistance had been offered by the victim.

The three petitioners, and their accomplice, Benny Dorfman, who testified against them on the trial, succeeded in looting the Readers Digest truck of money and checks, escaping to Brooklyn, New York City, and dividing the loot at the home of Dorfman within a few hours after the murder, as will be shown, *infra*.

(4) The police officers who obtained the confessions of the petitioners, Cooper and Stein, as well as the other witnesses, testified under oath that these confessions were freely and voluntarily given.

(5) The trial Judge, under well-accepted legal principles, submitted to the jury the question as to whether the confessions of Cooper and Stein were voluntary in accordance with New York law (New York Code of Criminal Procedure, Sec. 395; *People v. Doran*, 246 N. Y. 409, at 423), and in accordance with the mandate of this Court in *Lyons v. Oklahoma*, 322 U. S. 596 at 601 where the majority held:

“The mere questioning of a suspect while in the custody of police officers is not prohibited either

as a matter of common law or due process. *Lisenba v. California*, 314 U. S. 219, 239-241; *War v. United States*, 266 U. S. 1, 14. The question of how specific an instruction in a state court must be upon the involuntary character of a confession is, as a matter of procedure or practice, solely for the courts of the state. When the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process, under the Fourteenth Amendment, are satisfied and this Court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness. The instruction given satisfies the legal requirements of the State of Oklahoma as to the particularity with which issues must be presented to its juries, *Lyons v. State*, 138 P. 2d 142, 164, and in view of the scope of that instruction, it was sufficient to preclude any claim of violation of the Fourteenth Amendment."

The instructions to the Jury in the case at bar by the presiding trial Judge on this issue are quoted *infra*.

(6) The actual killer, Wissner, who murdered Petrini without warning at the inception of the robbery, is an intruder and interloper upon the due process clause of our Fourteenth Amendment. He never vouchsafed a confession of his participation in the murder, either orally or in writing. He did not testify in his own behalf on the trial or on behalf of the petitioners, Stein and Cooper. He chose to forego his precious right to take the stand and assert his innocence before the trial judge and the jury. He also refused to testify as to any alleged violence or intimidation on the part of the police or anyone else.

On the trial, he was identified as the killer of Petrini by Waterbury, the driver of the Readers

Digest money truck. Waterbury also pointed out Stein on the trial as the one who had tied him up during the robbery. The accomplice, Dorfman, on the trial, also pointed out Wissner, Cooper and Stein as the other three participants in the holdup and robbery which resulted in the felony murder of Andrew Petrini.

(7) The admission in evidence of the typewritten confessions of the petitioners, Cooper and Stein, in which references are made to the participation of Wissner in the felony murder of Andrew Petrini met the requirements of due process, because the trial judge admonished the jury time and time again that such confessions were binding and admissible only against the person or persons who made them. In challenging this procedure, counsel for the killer, Wissner, inferentially denounce our Jury System and say, in effect, our juries are too stupid to take instructions from the trial judge. Such a vicious argument answers itself. Such procedure meets the requirements of due process.

(8) The denial of a separate trial to the petitioner, Wissner, met all the requirements of due process and was based upon the sound discretion of the trial Judge.

People v. Snyder, 246 N. Y. 491;

People v. Fisher, 249 N. Y. 419;

People v. Feolo, 282 N. Y. 276;

cf Sec. 391, New York Code of Criminal Procedure.

In *People v. Snyder*, *supra*, Judge Lehman, writing for the unanimous Court, referred to the rule laid down in *U. S. v. Marchant*, 4 Mason 258, affirmed 25 U. S. 480, in the following language:

“Section 391 of the Code of Criminal Procedure as recently amended (L. 1926, ch. 461) provides that

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defendants jointly indicted may be tried separately or jointly in the discretion of the court. It may be assumed that the Legislature did not intend to leave arbitrary choice to the court. Discretion involves the exercise of a sound judgment, and its attempted exercise may be reviewed by an appellate court, at least where the appellate court has jurisdiction to pass upon questions of fact. The statute has merely restored the common-law rule that a separate trial of defendants who were jointly indicted might not be demanded as a matter of right by the accused but might be ordered in its discretion by the court. (*People v. Howell*, 4 Johns, 296; *People v. Vermilyea*, 7 Cow. 108). That rule prevailed not only in England but in this State until changes in this State in 1829 by statute. (See *People v. Doran*, 246, N. Y. 409.) In *U. S. v. Marchant*, (4 Mason, 258; affd., 25 U. S. 480) Mr. Justice Story has reviewed the history of the exercise of the power of the court to grant a separate trial to persons jointly indicted. He pointed out that at common law as developed in England, persons jointly indicted might be jointly tried unless the court in its discretion ordered that each defendant should be tried separately; though the difficulty of obtaining a jury at a joint trial, if each defendant insisted upon the exercise of his right to interpose the full number of peremptory challenges accorded to him under the law of England, gave rise to a general custom of ordering separate trials unless the defendants agreed to join in all peremptory challenges.

"Since that case all jurisdictions in this country have accepted the rule that defendants jointly indicted are not entitled to separate trials unless the court in the exercise of its discretion so orders. Appellate courts in various jurisdictions have at times reviewed such orders. No general rule limiting or governing the exercise of the court's discretion

can be deduced from these decisions. The Legislature has not seen fit to set fixed bounds to the exercise of the discretion it has restored to the courts. The courts should apply but one test. Will a separate trial impede or assist the proper administration of justice in a particular case and secure to the accused the right of a fair trial? The decision of the trial court rendered before the trial is dictated by a reasonable anticipation based on the facts then disclosed. The decision of this court rendered upon a review of the trial itself rests upon determination of whether the prophesy has been realized."

In *People v. Snyder*, both defendants were tried jointly and the confessions of both defendants were received in evidence. The denial of a separate trial to Wissner related to a procedural question under the New York Code of Criminal Procedure, Sec. 391. Such denial was affirmed by the New York Court of Appeals. Due process is not involved in such denial.

The following fact material is supplied to aid the Justices of this Court in deciding that the three petitioners were justly convicted in Westchester County, New York, of the felony murder of Andrew Petrini in that County on April 3, 1950:

Record Facts Material to the Questions Presented.

General Outline of the Case.

Andrew Petrini was employed by the magazine, Reader's Digest, to ride on a truck from its plant in the Town of New Castle, County of Westchester, New York, to the Post Office and the bank, assisting in handling delivery of mail and money sacks and other parcels (199). On April 3, 1950, in the same town he was shot to death by the petitioner,

Nathan Wissner (217), during a robbery in which money and checks were taken. Another truck, which intercepted and cut off the Reader's Digest truck was driven by the petitioner, Calman Cooper (546-548-553). The driver of the Reader's Digest truck, Waterbury, was tied up by the petitioner, Harry A. Stein (218).

A fourth conspirator, Benny Dorfman, took the wheel of the Reader's Digest truck and drove it to a secluded lane (559). The case of this defendant was severed, and he testified for the People.

WILLIAM WATERBURY, testified that he was 26 years of age, married, had been in the United States Army and had worked for the Reader's Digest for more than five years as a truck driver whose duties included taking Andrew Petrini to the bank with money to be deposited (198-199). On April 3, 1950, this witness carried two of the bags which contained the checks and were intended for the Railway Express office and Andrew Petrini carried the small bag with the cash in it down to the Reader's Digest truck parked in front of the main building (204-205, see photograph, People's Exhibit No. 7 at page 2809). These bags were put in the right hand side of the Reader's Digest truck and Andrew Petrini sat on a small cushion with his back to the windshield (213-214). Neither Waterbury nor Petrini was armed (214).

This truck left the front of the Reader's Digest Building and started out its driveway to the highway known as Route 117 but another truck in front of Waterbury kept cutting him off and finally forced him to stop and then the witness Waterbury saw the petitioner Wissner making a last step towards the door on Petrini's side and Wissner grabbed the door and it did not open. Then the defendant Wissner shot Petrini and came through the door and

ordered Waterbury to get into the back of the truck, where he was tied up by the defendant Stein (215-216-218). The truck then was driven off by someone whom he did not see to a road where it was left (216-217). Andrew Petrini, when the shot was fired, had slumped over and was bleeding and there was a hole in the glass window of the door which had not previously existed (219, see People's Exhibit 18 in Evidence at p. 2827). Waterbury noticed after the robbers had left that the bags containing the checks and the money were gone (219). The gun used was described by the witness as a revolver (221). Andrew Petrini died at about 10:10 P. M. on April 3, 1950 (167). Except for the bullet wound the body was found to be normal and the cause of death was given as firing a bullet into his head (172).

The proof established that the idea of holding up the money truck of the Reader's Digest Association originated in the mind of petitioner Cooper (2053-2055-2056-2874).

(1) The Brassett Testimony.

The People's witness, Brassett, testified that he and petitioner, Calman Cooper had been inmates at the Federal prison in New York City in 1949, the year before the murder in question. Brassett had been sentenced for mail theft, having stolen money from mail addressed to the Reader's Digest in Pleasantville, New York. Brassett pointed out Cooper on the trial and stated that he had met Cooper at the Federal prison in New York City after Christmas of 1948. Brassett and Cooper continued as inmates together for approximately five or seven months until the summer of 1949. They worked together and spent their recreation time together in prison (2053-2056).

Brassett told Cooper about the mail route, the pouches of mail, the volume of business of the Reader's Digest and that if Brassett "wanted to make a big haul," he "could

make it through the Digest and really make something out of it for the rest of my life" (2056-2057). Cooper and Brassett also discussed the money carried on the Reader's Digest truck, and the routine of the truck (2058-2059).

(2) The Witness, Jeppeson.

On April 3, 1950, the day of the crime, and for sometime prior thereto, Arthur L. Jeppeson was employed at the Spring Auto Renting Company, at the corner of Spring and Thompson Streets, Manhattan, New York City. Jeppeson identified People's Exhibit 20 (223-2828), a photograph of a 1937 Chevrolet carryall truck, the truck used in the hold-up of the Reader's Digest truck, as one that he had rented to Cooper on four occasions, March 11, 18, 25 and April 3, 1950, the day Andrew Petrini was murdered. Cooper rented the truck under the name of Walter W. Comins and exhibited an operator's license No. 1434549 in the name of Walter William Comins (779-785) (People's Exhibits 41-42, 2852-2854). After Cooper rented this truck from Jeppeson at ten or ten-thirty on the morning of the crime, it was never returned to Jeppeson up to the time of the trial (786). People's Exhibit 37, 695-2845), is a reproduction of the application for the New York State Operator's License in the name of Walter William Comins, No. 1434549. The People's Witness, Perlmutter, of the New York State Motor Vehicle Bureau, established that an operator's license No. 1434549 was issued on November 3, 1949, pursuant to the application, People's Exhibit 37. The police were in contact with Jeppeson on the night of April 3, 1950, shortly after the commission of the crime, because this rented truck was abandoned by the three petitioners near the scene of the crime, was found by the State Police, and traced to Jeppeson.

Some two months later, on June 5, 1950, just a few moments before Cooper's arrest, Jeppeson saw Cooper on 120th Street, between Morningside and Amsterdam Avenues, Manhattan, New York City. Jeppeson had received a call from the State Police by previous arrangement. Jeppeson walked towards Cooper on 120th Street and Cooper touched Jeppeson on the arm. Cooper then told Jeppeson: "that this truck that he rented from me was in a killing upstate and he had nothing to do with it" (788-789).

Jeppeson then asked Cooper: "Why the hell didn't you report it to the police," and "I asked him about the license, what became of the license, why did he give me that license", and Cooper said: "That is the license they give him to give me" (789). Cooper also asked Jeppeson if he had been shown any photographs of Cooper and Jeppeson "told him yes". Cooper entreated Jeppeson not to identify him and Jeppeson promised that he would not (790).

Of course, Cooper was not in custody at this time on the morning of June 5, 1950. No threats, fear or force had been exerted against him. No promises had been made to him. He was at liberty on the streets of New York City. What inferences, except those of guilt, could the triers of the facts draw, observing Jeppeson, the honest business man, as he gave this crushing evidence against Cooper? For all practical purposes, Cooper had admitted guilty knowledge to Jeppeson. The character and integrity of Jeppeson was unimpeached.

A detective was following Jeppeson during this incident and Jeppeson nodded to him (789). It was at this time that Sergeant Sayers and Sergeant Barber of the State Police closed in and took Cooper into custody (790-791).

According to Sergeant Sayers, this arrest took place sometime about 9:15 on the morning of June 5, 1950 (1310-1311). As Sergeant Sayers, in the company of Sergeant Barber of the State Police and Detective Mulligan of the New York City Police accosted Cooper, Cooper had his hand in his right-hand coat pocket. After identifying himself and his companions as police officers, Sergeant Sayers ordered Cooper to take his hand out of his pocket. Sergeant Sayers felt an object in Cooper's pocket. Cooper refused. Sergeant Sayers then grabbed Cooper by both arms, and as Cooper started to wheel around, Sayers threw Cooper against the building which had a cement wall and then took Cooper into custody (1311).

The extent of any injuries that Cooper may have sustained during this violent episode at the time of his arrest is unknown.

(3) The Witness, William Cooper.

Called by the People, William Cooper testified that he is the brother of the petitioner, Calman Cooper (696). He also used the name Walter William Comins (697).

William Cooper, or Comins, admitted that he made the application for an operator's license, People's Exhibit No. 37 (698), under the name of Walter W. Comins. This is the operator's license used by the petitioner, Cooper, to hire from Jeppeson, the truck used in the robbery of the Reader's Digest money truck.

William Cooper also registered at the Edison Hotel, 227 West 47th Street, New York City, on November 1 and 2, 1949, under the name of W. W. Comins and he received the operator's license in the mail at the Edison Hotel (698-699), although his home was in Jamaica, Long Island (701).

William Cooper or Comins went to the Federal Prison, New York City, on January 6, 1950, and was still incarcerated.

ated there on November 17, 1950, when he testified on the trial in the instant case. He stated that when he went to prison he left the operator's license with his papers at home (700-701).

(4) The Witness, Estelle Norma Cooper.

She is the wife of William Cooper. She had lived with her husband for six years prior to January, 1950. She knew the petitioner, Calman Cooper, and saw him at her home several weeks after her husband was sentenced to Federal Detention Headquarters in January, 1950. The petitioner, Cooper, came to her home several times in January and February, 1950, and several times in March, 1950. The petitioner, Cooper, had access to William Cooper's papers on these visits and assisted in the administration of William Cooper's affairs during February and March, 1950 (703-704). The People urged on the trial that it was during this period that the petitioner, Cooper, appropriated the operator's license illegally obtained by his brother, William Cooper or Comins, and used it to rent the truck used by the three petitioners in the hold-up of the Readers Digest money truck.

(5) The Accomplice, Dorfman.

Dorfman, who testified for the People, had no prior criminal record. He and Wissner were partners in the automobile rental business in New York City on the day of the crime and for some months prior thereto (486-487).

Dorfman knew the petitioners, Cooper and Stein, having met them about six weeks prior to the commission of the crime at Dorfman and Wissner's place of business. Cooper and Stein were together (488). Dorfman, Cooper and Stein had visited the scene of the crime and its vicinity at least three times before the day of the hold-up and watched

the operations of the Reader's Digest money truck on the highway and in the vicinity of the Post Office in Pleasantville. Cooper, Stein and Dorfman discussed the operations of the truck on these occasions (491-495). Cooper drove the Spring Auto Rental truck which he had rented from Jeppeson, (People's Exhibit 9, 2812), on these occasions and on the day of the crime (489-543-1625). Cooper carried the guns on these trips (504). Cooper discussed the hold-up plans with Dorfman and Stein (505).

Dorfman placed Cooper in the company of Wissner and Stein on the day of the crime before starting out from Manhattan. Cooper drove the Spring Rental Truck to the scene of the crime and drove it during the time that it cut off the Reader's Digest truck. Cooper drove the Spring Rental truck from the scene of the hold-up and shooting to a point where a "get-away" Chevrolet car had been parked. Cooper then drove in the Chevrolet passenger car to the place where Dorfman had driven the Reader's Digest truck with Wissner, Stein and Waterbury in the rear. The petitioners, Wissner and Stein, then entered the Chevrolet "get-away" car driven by Cooper (562). Cooper also carried the tan valise (People's Exhibit 28) with three guns in it (536-562).

Dorfman also placed Cooper, Stein and Wissner in the Chevrolet sedan on the ride to the Bronx, New York City, subway after the robbery and shooting was completed. Cooper drove for a while and then Wissner took over (562).

Cooper boarded the subway in the Bronx with Dorfman, Stein and Wissner (568). Cooper finally arrived at Dorfman's apartment in Brooklyn with Dorfman, Stein and Wissner about 5:30 P.M. Dorfman's wife was at home with their children. Stein and Cooper had the valises. Cooper took part in dividing the loot in Dorfman's apartment. Then Cooper and Stein left (569-572).

(6) The Witness, Regina Dorfman.

She saw Cooper enter her apartment with Wissner, Stein and her husband, the accomplice Dorfman, between five and six P. M. on the day of the crime (948).

Either Cooper, Stein or Wissner carried the tan valise, People's Exhibit 28 (536-2834), in which the fragment of the Reader's Digest Discount Certificate was found later by the State Police (950). Cooper and Stein were introduced to her (951).

Cooper went into a bedroom with Dorfman, Stein and Wissner. Cooper and Stein left together within an hour (951-953).

The Witness, Michael Homishak.

Homishak, who had shared space with the petitioner, Wissner, and the accomplice, Dorfman, at their place of business in New York City, saw petitioner, Cooper, with Stein, Wissner and Dorfman at the Wissner-Dorfman automobile rental agency at times during the six-weeks just prior to the robbery and murder (887-888).

Homishak also saw Cooper in the company of Stein, Wissner and Dorfman at 11 A. M. on the morning of the day of the crime in the vicinity of the Wissner-Dorfman rental agency (889-890).

Cooper left the premises with Wissner and Stein before noon on the day of the crime (890). Homishak did not see Cooper again that day.

Andrew Petrini was shot to death during the hold-up of the Reader's Digest truck at approximately 3 P. M. that day (205-211).

The Confessions and Admissions of the Petitioners, Cooper and Stein, Were Properly Received in Evidence.

As to the Confession of Cooper.

The confession of Cooper (People's Exhibit 59, 2875), was admitted in evidence (p. 1521) after the deletion of certain references to the petitioners, Stein and Wissner. Cooper recites in this confession intimate details that could not possibly be known to anyone except a participant in the crime.

Cooper's confession takes up approximately eleven pages of the record. It was taken in the presence of New York State Parole Commissioner Edward J. Donovan and John P. Reardon, the District Assistant Director of the New York State Parole Board, Trooper Buon, Corporal McLaughlin and Sergeant Sayers of the State Police and notarized by Sergeant Barber of the State Police.

Cooper not only disclosed his association with Brassett but also revealed his renting from Jeppeson of the Spring Auto Rental Truck used in the crime, under the name of W. W. Comins, the preliminary visits to survey the scene of the planned crime, the routine of the Reader's Digest truck, his participation in the crime, the flight and disposition of the loot (pp. 2875-2888).

Corporal McLaughlin, who typewrote Cooper's confession in the presence of Cooper while the questions were being addressed by Sergeant Sayers (1171), testified that no force or threats were used against Cooper nor were any promises made to him (1174). Cooper signed the confession in the presence of Corporal McLaughlin and Cooper made corrections in his own handwriting after reading the confession (1172-1173).

Troopers Hess and Leon testified they had taken turns in guarding the defendant Cooper from his arrival at the

State Police Headquarters to the taking of the confession, and that they had brought to Cooper the same food that was served to the troopers at each meal, and that a mattress was brought in and Cooper slept on the night of June 5th (confession was made on evening of June 6th) on a mattress from approximately 12:30 A. M. to after 8 A. M. (1387-1405, 1412-1439).

District Assistant Director John T. Reardon of the New York State Board of Parole, and an Assistant to Parole Commissioner Donovan, testified as to his presence in the headquarters of the State Police in Westchester County on the evening of June 6, 1950, at 8:00 P. M., when he conversed with Cooper at Cooper's request (1442-1447). (This negatives assertions in petitioners briefs that the petitioners were held incommunicado.) Reardon declared that at this time Cooper did not complain to him that he had been beaten or threatened (1449). Reardon noticed no wounds, cuts or bruises on Cooper on the evening of June 6 (1449).

Reardon's testimony at pages 1452 and 1453 indicates that Calman Cooper confessed after he was assured by Parole Commissioner Donovan that his brother, Morris Cooper, would not be punished for his parole violation for being in New York State instead of Florida at the time that his brother, the petitioner, Calman Cooper, was arrested.

If Cooper confessed his guilt in the case at bar to relieve his brother, Morris, of any penalty that might follow a parole violation, such a confession is valid under Section 395 of the New York Code of Criminal Procedure.

At ten o'clock on this evening of June 6, 1950, Cooper gave an oral confession to the Parole Officer Reardon and Parole Commissioner Donovan (1453). Cooper seemed to be in normal physical condition, although a little tired.

Reardon noticed no wounds, cuts or bruises and Cooper did not complain that he had been mistreated, threatened or beaten (1454). No promises were made to Cooper (1458).

Trooper Buon and Sergeants Sayers and Barber of the State Police also denied on the stand that any threats, violence, force or promises had been exerted against Cooper (2116-2074-1319).

Trooper Buon, Corporal McLaughlin, Sergeants Sayers and Barber of the State Police and Director Reardon of the State Parole Board were all subjected to cross examination by petitioner's counsel concerning the circumstances under which Cooper's confession was taken. Despite this fact no evidence of threats, force, violence or promises was produced on these cross examinations.

In addition, Corporal Dershimer and Troopers Dirschka and Pietrack testified on behalf of the People as to their parts in the investigation (1095-1103), but were not cross examined by the defense as to any threats or violence. Corporals Brann and Sweeney and Trooper Crowley were produced at the defendants' request and examined by defense counsel (2372-2293-1684-2382), but they were not questioned by the defense as to any threats or beatings. Moreover, on another occasion, Sergeants Hardy and Horton, Corporal McLaughlin and Troopers Leon, Crowley and Tudesco were produced in open court by the People at the request of defense counsel during the cross examination of the Reader's Digest truck driver, Waterbury (417-419), but were not interrogated at this time as to any threats or force exerted against any of the petitioners while they were in custody and before arraignment.

The petitioners personally and in open court had an opportunity to view all of these officers and advise their counsel that one or more had threatened or beaten them. The best proof that these officers did not beat or threaten

the petitioners lies in the fact that the defense never examined them on this issue. No witnesses called either by the People or the defense testified that any of the petitioners were threatened or beaten while in custody. Not one of the petitioners testified on the trial.

Motives for Cooper's Confession

Insofar as Cooper is concerned, the jury may well have found that the motivating force behind Cooper's decision to confess was the fact that Cooper knew that Jeppeson had been taken into custody with him and that Cooper knew the State Police were well aware that Jeppeson had rented the truck used in the crime to Cooper. In addition, Cooper knew that he had made a damaging statement to Jeppeson on West 120th Street, New York City, on the morning of June 5, 1950, immediately prior to his arrest. Moreover, Cooper also knew shortly after his arrest, that the State Police must be familiar with his conversations with Brassett at the Federal Prison, New York City, concerning the Reader's Digest money truck because shortly after Cooper's arrest, Brassett was brought into the presence of Cooper at State Police Headquarters in Westchester County (1312).

Under these circumstances, the jury may have well found that Cooper realized the hopelessness of his position and decided to make the best bargain possible.

It was evident that the State Police closed in on Cooper quickly and suddenly on June 5, 1950, because he was about to leave for Florida (2645). Cooper also knew that his brother, Morris, had violated his parole by being in New York instead of in Florida. In fact, Morris Cooper, was taken into custody at the Air Lines Terminal in New York City shortly after Calman Cooper's arrest, while attempting to return to Florida (2039-2040). Morris Cooper, and

Charles Cooper, the father of Morris and Calman, were suspects in the opinion of the State Police (1319).

It could appear quite logical to any jury that Calman Cooper, realizing that Brassett and Jeppeson were available as witnesses against him, that his brother, Morris, was in custody as a parole violator, and that his father was also detained as a suspect, and knowing that his brother and father were innocent of any complicity in the crime charged, would seek to obtain the freedom of his father and brother in exchange for a statement concerning his participation in the crime and the parts played by the accomplice, Dorfman, and the petitioners, Stein and Wissner.

This is precisely what the petitioner, Cooper, chose to do. He requested an interview with the New York State Parole authorities which was granted. He spoke with Assistant Director John T. Reardon at 8 P. M. on June 6, 1950, at Westchester County State Police Headquarters. Cooper, evidently, was not satisfied that Director Reardon had sufficient authority to grant Cooper's request as to liberating his father and brother, and so one of the New York State Parole Commissioners, Edward Donovan, came to Westchester State Police Headquarters later that evening at the request of Director Reardon, and it was not until Calman Cooper was assured by Commissioner Donovan that his brother, Morris Cooper, would not be punished for parole violation, that he confessed his guilt that same evening in the presence of Director Reardon and Commissioner Donovan.

In sharp contradiction of counsel's pleas that Cooper's spirit was broken by threats and violence, this evidence would indicate to any sensible jury that Cooper was master of the situation and laid down, himself, the terms upon which he would confess his guilt of the crime charged (1316).

The good faith of the State Police on this issue is further substantiated by the fact that Charles Cooper, the father of the petitioner, Calman Cooper, was released by the State Police on June 7, 1950, the day after Cooper confessed his guilt and a full day before the arraignment, having been cleared of any guilt by Cooper and by the petitioner, Stein (1382).

As to the Confession of the Petitioner, Stein.

Compelled by the practical necessity of taking Stein into custody for the same reasons that held true in the case of Cooper; namely: the fear that Cooper might get away to Florida before the identity of those associated with Stein and Cooper in the killing on April 3, 1950, could be more definitely established, and the fear that Stein would also flee if he discovered Cooper's arrest, the State Police arrested Stein at his brother's home in New York City at 2:00 A. M. on Tuesday, June 6, 1950 (1685-1697-1957-1959). (The petitioner, Wissner, was still at large and the accomplice, Dorfman, was a fugitive.) The State Police were in plain clothes, and were accompanied by New York City Detective William Mulligan who told the petitioner, Stein, in the immediate presence of his brother, Lou, that Stein was being arrested by the State Police (1959-1697).

The State Police have jurisdiction throughout the State, and power to arrest any place in the State (1699), they are Peace Officers of the State and this crime constituted a felony (Executive Law, New York, Section 223). Moreover, New York City is within the territory of Troop K of the State Police (1903) which was investigating the case. Stein then was taken to the State Police Headquarters in Hawthorne, in Westchester County, where the crime had been committed, arriving there at about 3:00 A. M. (1689) on June 6th. He was not questioned until 10:00 A. M. June

6th, and at that time denied any connection with the killing (1904-1906).

At 2:00 A. M. on June 7th, Captain Glasheen showed a portion of Cooper's confession, which implicated Stein, to Stein and told him to "sleep on it" (1938-1939-1954). Shortly after 9:00 A. M. Captain Glasheen received a message that Stein wanted to see him, and a little later between 10:00 and 11:00 A. M. Stein made an extended oral statement in which he gave all details and implicated himself in the hold-up (1908-1909).

After lunch the formal written confession (Peo's. Exh. 64, 1968-2896) was taken by a civilian stenographer, Mrs. Anna Klaus, in one of the offices of the State Police on June 7, beginning at about 1:30 P. M. and ending at 4:30 P. M. (1576-1579). All of the answers were made by Stein to questions put by Captain Glasheen (1578). No one had Cooper's confession there to use in prompting Stein (1939). After Stein's confession was typed, it was read by Stein and read to him, and he made corrections and initialed them (see pp. 2900 and 2902) before signing the confession (1580). Mrs. Klaus testified no force or violence was used and no promises made during the time she was with defendant taking his confession, and that he freely answered the questions (1581-1582). Her stenographic notes were read by Stein's counsel (1614-1615, Stein's Exh. CC, 1615).

Stein never complained to State Police Captain Glasheen, the Commander in New York City and adjoining Westchester County, that he had been beaten, mistreated or threatened in any manner by any of the Police Officers under his command (1913). Captain Glasheen saw no cuts, wounds or bruises on any portion of Stein's person at any time on June 6th or 7th.

The following day, June 8th, Stein went with Captain Glasheen and Trooper Crowley to the Reader's Digest property, and Stein pointed out the location from which he had observed the main entrance from which the Reader's Digest truck commenced to leave the premises on the day of the robbery and murder (1699-1702), and related on the spot how this crime had been committed, and also went over the route to point out a spot at which he and the others had thrown away the guns (1992-1996).

Again on that same evening the petitioner, Stein, was brought into a room in the State Police Headquarters, and in the presence of the District Attorney and two Assistant District Attorneys (2143), he identified one of the persons there (William Waterbury) as being the driver of the Reader's Digest truck whom Stein had tied up in the back of that truck on April 3, 1950, the day of the robbery and killing (2161). When Dorfman could not be found on Thursday, June 8, Stein along with the petitioners, Cooper and Wissner, was arraigned before a Magistrate on Thursday night, June 8th (2136), and then taken to the Westchester County Jail.

On the morning of June 9th, Stein was examined by Doctor Robert Vosburgh, attending physician at the jail, who found bruises in the left bicep area (1712, see Peo's. Exh. 65 at p. 2909). This was the examination given to all new prisoners, and did not result from any complaint or request of the defendant.

The Trial Court charged the jury that the delay in arraignment of all of the petitioners was unnecessary as a matter of law (2777). In addition, the only undisputed affirmative proof of any change in Stein's physical condition related to the bruises on the very small area of the belly of the muscle of the left bicep, which could have been caused by a strong grip of one of the arresting officers at

the time he was taken into custody (1737-1739). There is no proof in the entire record that these marks resulted from any beating, or that the confession and the numerous admissions flowed from them. Whatever circumstantial inferences might be drawn from these facts alone, since Stein did not take the stand to offer any proof, was rebutted by the full testimony of the questioning officer, Captain Glasheen, and the stenographer, Mrs. Klaus, and other witnesses present when the Stein confession was taken and by other police officers.

Contrary to the impression attempted to be created that Stein was held in a place where he could be coerced by questioning, unobserved by others, the civilian witness, Jeppeson, saw Stein when Jeppeson went down to get a pack of cigarettes in the room where Stein was seated (808). Apparently this was on the morning of Tuesday, June 6th. Again on Thursday, June 8th, before Stein made his identification of Waterbury, the driver of the Reader's Digest truck on the day of the murder, the witness, Regina Dorfman, saw Stein on the first floor of State Police Headquarters seated on a couch reading a paper (979). Stein then and there said that he knew Regina Dorfman, the wife of the accomplice, Benny Dorfman. Then Stein, in the presence of the District Attorney, exhibited clearly his independence of compulsion by denying he had supplied the tape and twine used in the holdup (2163).

The testimony of John Duff, of counsel for petitioner, Stein, (1827) presents only an issue of fact as against the unalterable record made by Doctor Vosburgh. This resourceful and experienced attorney, who had seen Stein on June 9th, made no complaint to the County Judge of Westchester County when he was before him with Stein on June 16th when Stein was arraigned to plead to the indictment. Stein himself made no complaint to the Magistrate

on the night of June 8th when he was first arraigned nor did he complain to the County Judge when he was arraigned on June 16th.

Most important of all, it appears without contradiction, that after Stein had been shown a portion of Cooper's confession he was left to "sleep on it", so that the oral statement the next morning was not the product of questioning during the night but of his own reflection. What was more natural than his own bitterness at Cooper and a desire to "get even" (2239).

The motivation for Stein's confession, its efficient cause, was bitterness against Cooper for having implicated Stein. This came as a spontaneous outburst to a New York City detective on June 7th, in the evening after his confession had been given that afternoon:

"He said that 'that rotten son-of-a-bitch Cooper it is hard to believe he would put me in the way he did, he put me right into the seat, I was the best friend he ever had; well, if I must go, I will take him with me'" (2239).

This realization of full implication by Cooper is an important factor (*People v. Borowsky*, 258 N. Y. 371, 372).

At the time Stein began to give his detailed oral statement on June 7th, Wissner had not yet arrived at State Police Headquarters (1950-1951). An effort was being made to apprehend all of the four involved in the crime and arraign all together, and this continued to the evening of June 8th, 1950 (1947, 2008, 2088, 2089, 1320, 1321, 1322, 1323) when the three petitioners were arraigned, all efforts to apprehend the accomplice, Dorfman, having failed.

The petitioner, Wissner, was not arrested in lower Manhattan, New York City, until June 7, 1950 at approximately 9 A. M., two days after the arrest of Cooper and one day

after the arrest of Stein. The fourth participant in the robbery and murder, Dorfman, was a fugitive and did not surrender until June 19, 1950 long after the three petitioners had been arraigned, indicted by the Westchester County Grand Jury and charged with the commission of the crime of murder in the first degree.

In the cases at bar, this Court is asked to infer that because certain bruises appeared on Stein and Cooper on June 9, 1950, that their confessions on June 6 and 7 were extorted by beatings.

In the case of Stein we have seen that the bruises on the bicep area could have been caused by the grip of a strong man, and Officer Crowley who took Stein from his apartment to the State Police headquarters weighed 225 pounds and obviously was such a husky, strong man. It was a reasonable deduction for the jury to make that in taking Stein in for the crime of murder that at some time Crowley or one of the others had a tight grip on Stein. In Wissner's case there was concealment of previous medical treatment which was inadvertently revealed when his counsel gave Captain Glasheen a chance to show that he knew from questioning other people "that Wissner, when taken into custody, had injuries, he was under a doctor's care" (2026). This having been brought out before the jury, Wissner's counsel promised to show by X-rays that this was limited to the sacro-iliac area (2027) but these were never produced although Wissner presumably could make this proof by witnesses other than himself, if he so desired. Other suspicious facts were that when viewed by the doctor at the Westchester County Jail about 10 A. M. on June 9, 1950, the morning after his arraignment, there were abrasions on Wissner's shins, which have a maximum 5 hour healing

time (1772) and he reached the jail before midnight the preceding night, and also Wissner on June 12th had injuries which were not revealed on the complete examination of June 9th (1810). Sergeant Sayers said he had thrown Cooper against a wall hard because he believed his hand held a weapon in his pocket. This was a competent cause of some of the injuries. Doctor Vosburgh, the jail physician, said that the injuries of all of these men could have been caused in a number of ways, including self-infliction (1810).

In this case the confessions of Cooper and Stein were made from understandable motives. They were fed and they slept. The detention was not for the sole purpose of obtaining a confession where no other proof existed, but was forced upon the police by the need to take Cooper into custody before he left the State, and the hope of completing the investigation within a compressed period thereafter. This was proved when the arraignment occurred on June 8, 1950, the day Dorfman was expected in New York but did not show up. Cooper's confession was given first to a New York State parole commissioner whom he had sent for. There is no proof from anyone that these confessions were the result of violence. No complaint was made to the magistrate or the District Attorney at the arraignment on June 8th, 1950, or to the jail officials who received them on the evening of June 8, 1950.

Upon the record the Trial Judge's submission of the voluntariness of the confessions to the jury as a question of fact was proper. The issue of alleged coercion was clearly presented to them (pp. 2765-2769 incl.). The Trial Judge also instructed the jury that the confessions of the petitioners, Cooper and Stein, were binding only upon the confessors and no one else (2769-2770).

Argument.

(A) Delay in Arraignment was Insufficient to Bar the Cooper and Stein Confessions from the Jury.

In urging that the confessions of the petitioners Cooper and Stein should not have been received in evidence, petitioners stress the delay in arraignment of both. However, the New York Court of Appeals has consistently held that delay in arraignment, in and of itself, is not sufficient to exclude a confession.

In *People v. Trybus*, 219 N. Y. 18, at 22, the Court of Appeals reiterated the well-accepted rule in New York:

“* * * The practice of detectives to take in custody and hold in durance persons merely suspected of crime in order to obtain statements from them before formal complaint and arraignment, and before they can see friends and counsel, is without legal sanction. The question is not, however, whether the detective struck defendant or held him illegally in custody. Neither of these facts, *per se*, makes the reception of the statements in evidence illegal as matter of law (*Balbo v. People*, 80 N. Y. 484), although they are properly to be considered by the jury in determining the voluntariness of the statements. The question is whether defendant, voluntarily, not under the influence of fear induced by threats or under a stipulation of the district attorney not to prosecute (Code Crim. Pro. Sec. 395), made the statements.”

The traditional attitude of the New York Court of Appeals on this question was well summarized in *People v. Doran*, 246 N. Y. 409 at 423:

"Reviewing this case, therefore, as a whole, I think all the issues of fact were fairly left to the jury who heard all the testimony, saw all the witnesses, arrived at their conclusion apparently after a careful and discriminating consideration, and that we are not justified in disturbing their verdict because we may be of the opinion that the district attorney should have taken the defendant's confession in Albany instead of in Watervliet, or because the police authorities in their zealousness to unravel the Jackson murder did not immediately arraign the defendant after his arrest. Delay in arraignment does not exclude a confession. (*People v. Trybus, supra.*) Neither does the fact that officers of the law questioned the defendant persistently in regard to his connection with the crime (*People v. Rogers*, 192 N. Y. 331, p. 348), nor that they failed to warn him of his privileges or rights. (*People v. Kennedy*, 159 N. Y. 346, 360; *People v. Randazzo*, 194 N. Y. 147.) That the confession was sworn to is likewise no objection (*People v. Mondon*, 103 N. Y. 211, 219).

Even when evidence has been procured through wrong acts upon the parts of officials, it is not necessarily excluded. (*Adams v. New York*, 192 U. S. 585.)"

In *People v. Mummiani*, 258 N. Y. 394, at 396, the Court of Appeals again followed the doctrine enunciated in the *Trybus* and *Doran* cases, *supra*:

"Disregard of the duty of arraignment does not avail, however, without more to invalidate an intermediate confession. *People v. Trybus*, 219 N. Y. 18; *People v. Doran*, 246 N. Y. 309.) It is only a circumstance to be weighed with others in determining whether a confession has any testimonial value."

In *Stroble v. California*, decided April 7, 1952, 343 U. S. 5 (Law, Ed. Vol. 96, 529, at 540), Mr. Justice Clark, writing

for the majority of the Supreme Court Justices, held that delay in arraignment in the California Court did not constitute a denial of due process and said at page 540:

"Upon the facts of this case, we cannot hold that the illegal conduct of the law enforcement officers in not taking petitioner promptly before a committing magistrate, coerced the confession which he made in the District Attorney's office or in any other way deprived him of a fair and impartial trial."

(B) The failure of every one of the petitioners to testify as to any threats or violence exerted by the police while they were in custody leaves the record barren of the necessary proof required by section 395 of the New York Code of Criminal Procedure, and as required by the decisions of this Court.

Of course, the petitioners had every right to refuse to testify. However, by doing so they ran the risk that there would be insufficient proof that their confessions were obtained through fear produced by threats or violence. If such illegal practices had been used, which the People deny, the petitioners themselves would have been the best witnesses on this issue.

This consideration is of the utmost importance in this case because of the great number of witnesses who denied that any threats or violence had been exerted either against Cooper or Stein at various times while they were in custody, including:

- (1) Captain Daniel F. Glasheen, Commander of Troop K, State Police.
- (2) Sergeant Richard T. Barber, State Police.
- (3) Sergeant Joseph W. Sayers, State Police.

- (4) Corporal Walter E. McLaughlin, State Police.
- (5) Trooper Thomas V. Buon, State Police.
- (6) Trooper Frank K. Hess, State Police.
- (7) Trooper Arthur Leon, State Police.
- (8) Supervisor John T. Reardon, New York State Division of Parole.
- (9) Mrs. Anna A. Klaus, Civilian Stenographer, State Police.

Every one of the persons, who had charge of Cooper or questioned him, said no threats or violence were employed.

Other troopers, Brann, Pietrack, Sweeney, and Crowley, who had custody of Stein at various times, testified and were not questioned by counsel for the petitioners as to use of force, threats or violence.

(C) The problem confronting the State Police in view of the confessions of Cooper and Stein.

Cooper had been arrested on June 5, 1950, and confessed his guilt on the evening of June 6, 1950. Stein was arrested during the early morning of June 6 and confessed his guilt on the afternoon of June 7.

The question naturally arises: Why were Cooper and Stein not arraigned on June 6 and 7 after they had confessed their guilt? The reason is obvious from the State Police viewpoint. It is not an answer to the requirements of Section 165 of the New York Code of Criminal Procedure, but it emphasizes the good faith of the State Police and negatives innuendos of threats and violence. Wissner was not apprehended in New York City until June 7. He did not reach State Police Headquarters until noon on that

day. In the meantime, Dorfman, who had been named as an accomplice in the confessions of Cooper and Stein, was at large and did not surrender until June 19th. The arraignment of Cooper, Stein and Wissner, with the resulting newspaper publicity, would have constituted a signal to Dorfman to abscond. The Police were looking for Dorfman. In fact, defense counsel contend that Dorfman was a fugitive until he surrendered on June 19, 1950, after Cooper, Stein and Wissner had been arraigned before Justice Aylesworth in Chappaqua on the evening of June 8.

The best support for this reasoning is shown by the fact that People's Exhibit No. 62 (1325-2894), a photograph of the arraignment of the three petitioners on June 8, 1950, was published on the front page of at least one New York City newspaper on June 9, 1950, while Dorfman was still at large.

(D) The failure of Cooper, Stein or Wissner to complain on arraignment of any alleged threats or violence exerted against them while in custody.

Although Cooper confessed on June 6, and Stein on June 7, 1950, these petitioners were not arraigned before the late Justice Aylesworth in Chappaqua until the evening of June 8, 1950. It is evident that nothing could have been added to the complete confessions of Cooper and Stein after they had been made on June 6 and 7.

This Court's attention is invited to People's Exhibit 62, page 2894, the photograph showing the arraignment of the three petitioners on June 8, 1950. Cooper and Wissner show great diligence in hiding their faces. Their arms are functioning well. Stein appears ashamed and remorseful. None appear to be subjects for medical or hospital care.

Not
Cooper was 42 years of age at this time and had been previously convicted on four separate occasions including one for murder (100). Stein was 51 years of age and had been previously convicted on five separate occasions, including two robbery convictions (101). Wissner was 39 years of age and had previously been convicted on two separate occasions of attempted robbery and robbery (102). They were not unsophisticated youths but mature males familiar with criminal court procedure.

At the arraignment of Cooper, Stein and Wissner on June 8, 1950, they were in open court. Spectators were present. Not one of the three petitioners complained to the presiding Justice of any threats, violence or ill-treatment of any kind from the time of their arrest until the arraignment. They were not held incommunicado at this time but were scrupulously advised of their rights by the late presiding Justice (1269-1272, 1856-1857). The clerk of the court said all the defendants were well able to talk (1269).

Stein and Wissner were with the District Attorney at State Police Headquarters shortly before their arraignment, and all three defendants were with him when he arraigned them before the Magistrate. None of them complained to the District Attorney at those times.

(E) None of the three petitioners complained to Doctor Robert D. Vosburgh, attending physician at the Westchester County Jail, on the morning after their arraignment, that they had been threatened or subjected to violence of any kind.

It is only fair to emphasize at this time that the physical examinations of Cooper, Stein and Wissner by Doctor Vosburgh, the attending physician at the Westchester County

Jail on June 9, 1950, the morning after their arraignment, was a routine examination given to every newly admitted prisoner according to regulations then in force at the Westchester County Jail (1242-1243). These physical examinations were not made in pursuance of any complaints by the three petitioners. Other prisoners who had been in the jail for some time were examined by Doctor Vosburgh on the same morning (Ex. 000, pp. 1758-3008).

Doctor Vosburgh testified that none of the defendants complained to him that they had been mistreated by the State Police. He further stated that if any such complaints had been made he would have recorded them (1243-1244-1728). He also stated that the bruises found on Cooper could have been present for six days. Cooper had been in custody four days when examined. It was difficult for him to tell how long they were present (1246). The doctor did not know when or where the bruises were sustained. He said they could have been self-inflicted (1249).

The only evidence of injury to Stein, according to the report of Doctor Vosburgh's examination on June 9, 1950, was the bruise in the left bicep area (1741). The doctor testified that this bruise could have been sustained by Stein prior to his arrest on June 6, 1950 (1745). The doctor did not know how this bruising of the left bicep was sustained by Stein and Stein never told the doctor how he sustained the bruise (1745).

Stein's failure to complain to the County Judge upon his arraignment to plead to the original indictment.

John J. Duff, Esq., of counsel for the petitioner, Stein, testified on the trial that with the assistance of the District Attorney, he was permitted to visit Stein at the Westchester County Jail on the afternoon of June

9, 1950, the day after the arraignment of Stein in Chappaqua before Justice of the Peace Aylesworth (1839). He observed certain bruises on Stein at this time (1839) but admitted on cross-examination that he did not know when or where Stein sustained the bruises (1850).

Mr. Duff also testified that one week later, on June 16, 1950, he appeared with Stein before the Westchester County Judge when Stein entered a plea of not guilty to the original indictment and Duff also conferred with the court about withdrawal. Neither Stein nor Duff complained to the County Judge that Stein had been beaten or threatened (1848-1849).

Thomas J. Todarelli, Esq., of counsel for the petitioner, Cooper, also testified to a visit made by him to the Westchester County Jail on June 10, 1950, at which time he interviewed Cooper in the company of Daniel Reisner and Peter L. F. Sabbatino, Esqs., of counsel for Cooper. Mr. Todarelli found certain bruises on Cooper at this time (1260). He was also permitted to make a copy of the report of the medical examination of Cooper made by Doctor Vosburgh the day before (1263). Mr. Todarelli did not know when or where Cooper sustained the alleged bruises that he had described (1266).

It should be pointed out at this time that neither Mr. Sabbatino nor Mr. Reisner testified as to their observations of Cooper's physical condition on this occasion.

Although Deputy Warden Allen of the Westchester County Jail was called as a defense witness (1272-1857), no testimony was adduced that Cooper, Stein or Wissner complained to him at any time that they had been threatened or mistreated by the State Police or anyone else.

No further testimony having been offered as to the exertion of threats or violence against Cooper and Stein, there was a complete failure of proof on the part of these peti-

tioners that their confession had been "made under the influence of fear produced by threats" (Sec. 395, N. Y. Code Crim. Proc.).

Under these circumstances, in accordance with well-accepted principles, the most that can be said for the petitioners is that issues of fact as to the voluntariness of Cooper's and Stein's confessions were presented. These were properly left to the jury under the doctrine of *People v. Doran*, 246 N. Y. 409, where the New York Court of Appeals set forth the correct procedure at 415-416:

"When the point in the trial was reached at which the prosecution sought to introduce the confession, the learned trial justice very fairly and in accordance with our procedure took testimony both for the prosecution and for the defense upon the question of whether or not the confession was voluntary or was the outcome of fear and violence. Upon this question there was a dispute of fact. Doran, called as a witness in his own behalf at this stage of the prosecution, testified that he did not know what he was saying because of the beatings which he had received from the police officers. Numerous witnesses, hereafter referred to, contradicted him and showed that the confession was made both to the officers and to the assistant district attorney voluntarily, and after Doran had been confronted both by Harrington and by Damp, who had confessed.

"Here was an issue of fact. Who was to decide it? The jury. They heard all the testimony, and the court left it to them to say, after a very full and complete charge, whether or not the confession was voluntarily made, and instructed them that if they concluded that it was not voluntary, but had been obtained under the influence of fear produced by threats, they should throw it out of the case altogether, and disregard it. The judge told them that the People must prove and they must find it to be a

voluntary confession before it could be received as evidence. This is not only according to the practice in this State in the trial of criminal cases, but is also the law. When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant." * * *

"It may be that a question of fact created by Doran's testimony arose as to the voluntary nature of the confession. The jury, under proper instructions, and not the court, were the ones to determine this question of fact. No fault can be found with the very full and complete way in which the court instructed them upon this issue. In fact, no fault whatever is found with the judge's very able charge. For the judge himself to have determined this question of fact and to have excluded the confession altogether would have been going very far indeed toward usurping the functions of a jury, bordering almost upon arbitrary action."

In the *Doran* case the New York Court of Appeals followed and endorsed similar rulings in earlier cases including: *People v. Randazzio*, 194 N. Y. 147; *People v. Schermerhorn*, 203 N. Y. 57; *People v. Trybus*, 219 N. Y. 18; *People v. Nunziato*, 233 N. Y. 394. The same ruling was made by the majority of the Supreme Court Justices in *Lyons v. Oklahoma*, 322 U. S. 596 at 601, where the Court held:

"The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process. *Lisenba v. California*, 314 U. S. 219, 239-241; *Wan v. United States*, 266 U. S. 1, 14. The question of how specific an instruction in a state court must be upon the

involuntary character of a confession is, as a matter of procedure or practice, solely for the courts of the state. When the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process, under the Fourteenth Amendment, are satisfied and this Court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness. The instruction given satisfies the legal requirements of the State of Oklahoma as to the particularity with which issues must be presented to its juries, *Lyons v. State*, 138 P. 2d 142, 164, and in view of the scope of that instruction, it was sufficient to preclude any claim of violation of the Fourteenth Amendment."

This Court affirmed the murder conviction of Lyons.

Cases cited by the petitioners where convictions were reversed because of extorted confessions are not in point because in those cases the defendants testified as to threats or beatings and were corroborated by other evidence.

Walts v. Indiana, 338 U. S. 49;

Turner v. Pennsylvania, 338 U. S. 62;

Harris v. South Carolina, 338 U. S. 68.

These cases were all decided by a divided court, the *Turner* and *Harris* cases turning upon a 5 to 4 vote by the Justices of the Supreme Court. A reading of the opinions of the State courts in these cases discloses that in all of these cases the defendants took the witness stand and testified as to the alleged brutality inflicted upon them in order to obtain the purported confessions. These defendants raised a question of fact for the trial court by their testimony.

In the *Watts* case, the defendant testified that he had been beaten, starved, threatened and abused. Cf. *Watts v. State*, 82 N. E. (2d) 846, at 848, 849.

At the trial in the *Turner* case, the defendant denied the truth of the confession and asserted that it had been procured from him by fear and physical abuse. Cf. *Commonwealth v. Turner*, 358 Penna. 350; 58 Atl. (2d) 61, at 63.

During the trial in the *Harris* case, the defendant testified as to being struck by two police officers while detained and before the alleged confession was obtained. Harris also swore that during his questioning "one large officer" had a blackjack shaking it at him and that one of the officers also threatened the appellant with a beating with a rope and rubber hose if he did not confess the killing. Cf. *State v. Harris*, 212 S. C., 124, 46 S. E. (2d) 682 at 684.

Although the Supreme Court reversed the convictions in these cases, with four of the nine Justices dissenting in two cases, it is evident that the appellants at least presented testimony based on alleged eye-witness knowledge as to the alleged beatings of the appellants. No such evidence is available to the petitioners in the instant cases, all three petitioners having refused to testify in their own behalf.

In *Stroble v. California*, 343 U. S. 5, decided April 7, 1952, Vol. 96, Law Ed. 529 at 540, Mr. Justice Clark, writing for the majority of the Justices of the Supreme Court, affirming the judgment of the California Supreme Court which affirmed the petitioner's conviction of murder in the first degree, summed up the law applicable to the technique of counsel for the three petitioners in the case at bar in substituting surmise, speculation and legalistic argument

for competent evidence when they attempt to allege that the confessions of Cooper and Stein had been coerced:

"If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

The judgment of the Supreme Court of California was affirmed.

In *Ashcraft v. Tennessee*, 322 U. S. 143, cited by petitioners, Ashcraft testified in his own behalf as to the alleged coercion exercised upon him by the police including continuous questioning of him by the police in relays for thirty-six hours.

The petitioners in the instant applications attempt to transplant the facts of *Ashcraft v. Tennessee* to their own cases. There is no proof in this record that either Cooper, Stein or Wissner were questioned in relays. On the contrary, Cooper was allowed to sleep on a mattress and Stein was allowed to sleep on the night of the day of his arrest, and on the following morning he confessed on his own motion. Both were given the same meals that the police received. Wissner was arraigned on the evening of the day after his arrest and never confessed his guilt. Wissner was also given a place to sleep (2028).

In *Malinski v. New York*, 324 U. S. 401, reversing *People v. Malinski*, 292 N. Y. 360, 55 N. E. (2d) 353; Malinski took the stand in his own behalf on the trial and testified as to alleged violence exerted against him by two police officers. Moreover, this Court gave great consideration to the improper summation of the prosecution in reversing the judgment of death (Cf. opinion of Mr. Justice Douglas at pp. 405 to 407 including footnotes).

The County Judge of Westchester County, who presided at the jury trial in the cases at bar, had the *Malinski* case well in mind during the early stages of the trial of the three petitioners as appears from his comment to counsel for petitioner, Cooper, in the absence of the jury (1275). At page 1280 of the record the following declarations were made by the Trial Judge:

"The Court: The *People of the State of New York* vs. *Malinski*—have you read that?

Mr. Sabbatino: I have it.

The Court: I have it before me. That went to the Supreme Court of the United States, and that subscribes to the rule as to arraignment very clearly, and it has been approved by the highest court of this State and by the Supreme Court of the United States, and which I propose to charge in this case. The rule is very clear and I will state it to the jury at the proper time."

The argument of the prosecutor on this point also appears at pages 1280 and 1281.

In *Lisenba v. California*, 314 U. S. 219, the defendant testified on the trial that the police officers beat him; that his body was made black and blue; that the beating impaired his hearing and caused a hernia. The defendant had confessed the murder of his wife.

This testimony was contradicted by numerous witnesses for the State, as in the instant cases. It was admitted that the defendant was repeatedly and persistently questioned from Sunday night until Tuesday morning. No such proof exists in the cases at bar.

In spite of the prolonged questioning of Lisenba and his testimony as to the beatings administered to him, this Court affirmed the conviction.

The majority of the Court held (238-239):

"Here, judge and jury passed on the question whether the petitioner's confessions were freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not *ex nomine* one concerning due process. Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty, then, is to determine whether the evidence requires that we set aside the finding of two courts and a jury, and adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty, as to amount to a taking of life without due process of law.

"In view of the conflicting testimony, we are unable to say that the finding below was erroneous so far as concerns the petitioner's claims of physical violence, threats, or implied promises of leniency."

United States v. Carignan (decided November 13, 1951), 342 U. S. 36, 96 Law. Ed. Vol. 96, page 57, cited by petitioners, Cooper and Stein, is not applicable. The defendant was convicted of first degree murder in the United States District Court for the Territory of Alaska. The United States Court of Appeals for the Ninth Circuit reversed the conviction (185 Fed. (2d) 954). The sole ground of reversal was the admission of a confession obtained in a manner held contrary to the principles expounded in *McNabb v. United States*, 318 U. S. 332 and *Upshaw v. United States*, 335 U. S. 410.

The Supreme Court sustained the reversal of the conviction because the Trial Judge refused to permit the defendant to testify that the confession was involuntary, but

held that the surrounding facts did not necessarily establish coercion, physical or psychological, so as to render the confession inadmissible.

Most important, the Supreme Court, with no dissents, held that "so long as no coercive methods by threats or inducements to confess are employed, constitutional requirements do not forbid police examination in private of those in lawful custody or the use as evidence of information voluntarily given."

It must be noted that criminal prosecutions in the Federal Courts proceed under rules enunciated by the Supreme Court, whereas criminal prosecutions in the State Courts are not subject to such rules. As Mr. Justice Reed, writing for the majority in *Gallegos v. Nebraska*, 342 U. S. 55, said:

"The decision and judgment below determine for us that under the law of Nebraska such detention and examination, without appearance or arraignment, do not require exclusion of the confessions or plea as involuntary. The rule of the *McNabb* case considered recently in *United States v. Carignan*, No. 5, October Term, 1951 (U. S. , *ante*, 57, 72 S. Ct.), is not a limitation imposed by the Due Process Clause. *McNabb v. United States*, 318 U. S. 332, 340, 87 L. ed. 819, 823, 63 S. Ct. 608; *Lyons v. Oklahoma*, 322 U. S. 596, 597, note 2, 88 L. ed. 1481, 1483, 64 S. Ct. 1208. Compliance with the *McNabb* rule is required in federal courts by this Court through its power of supervision over the procedure and practices of federal courts in the trial of criminal cases. That power over state criminal trials is not vested in this Court. A confession can be declared inadmissible in a state criminal trial by this Court only when the circumstances under which it is received violate those fundamental principles of

liberty and justice' protected by the Fourteenth Amendment against infraction by any state."

In *Gallegos v. Nebraska*, 342 U. S. 55, Law. Ed. Vol. 96, p. 82, decided November 26, 1951, cited in the Cooper and Stein briefs, the defendant testified that he had been mistreated and threatened with violence while detained in Texas before he was returned to Nebraska to face a manslaughter charge. Gallegos confessed his guilt while so detained in Texas. The defendant had been detained for twenty-five days before being arraigned before a magistrate and could neither write nor speak English. Gallegos had been detained in Texas for eight days during which time no charge was filed against him nor was he arraigned before a magistrate and was then detained in Nebraska for fourteen additional days before arraignment.

The Supreme Court affirmed the conviction despite the testimony of the defendant that he had been threatened and mistreated before his confession.

Mr. Justice Reed, writing for the majority, said:

"A criminal prosecution approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect federal constitutional rights.

"While our conclusion on due process does not necessarily follow the ultimate determinations of judges or juries as to the voluntary character of a defendant's statements prior to trial, the better opportunity afforded those state agencies to appraise the weight of the evidence, because the witnesses gave it personally before them, leads us to accept their judgment insofar as facts upon which conclusions must be reached are in dispute. The state's ultimate conclusion on guilt is examined from

the due process standpoint in the light of facts undisputed by the state. That means not only admitted facts but also those that can be classified from the record as without substantial challenge."

No facts are asserted in the briefs or petitions of Cooper, Stein or Wissner which establish any threats or violence on the part of the police. The trial jury under proper instructions of the trial Judge have so found.

The instructions of the trial Judge to the jury in connection with the Cooper and Stein confessions and their legal effect on Wissner.

At pages 2765, 2766 and 2767 of the Record, the trial Judge carefully instructed the jury concerning the questions whether the confessions of Cooper and Stein were given freely and voluntarily:

"Ladies and gentlemen, there have been received in evidence statements alleged to have been made by the defendant Calman Cooper and the defendant Harry A. Stein. It is the contention of the People that these statements are in the nature of confessions and that they were made freely and voluntarily. On the other hand, it is the contention made on behalf of the defendant Calman Cooper and on behalf of the defendant Harry A. Stein that these alleged confessions are valueless as evidence against either of them, because it is contended on behalf of each of these defendants that these statements were made because of force and intimidation and fear visited upon each of them by certain members of the state police and implied coercion because of the manner in which they were kept in custody from the time of apprehension until the alleged confessions were made. You must find beyond a reasonable doubt that these confessions, or either of them, was a vol-

untary one before you would have a right to consider either of them.

"I charge you that the law of this State with respect to a confession is this, that a confession made by a defendant, whether in the course of a judicial proceeding or to a private person, can be given in evidence against him unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor. By itself, a confession is not sufficient to warrant a conviction without additional proof that the crime charged has been committed."

And so I charge you, ladies and gentlemen, that if you find from the evidence in this case that any of these statements, or either of them, made by the respective defendants, Mr. Cooper and Mr. Stein, were not freely and voluntarily made, or if you have a reasonable doubt, it is your absolute duty to disregard the entire statement."

The Trial Judge also properly instructed the jury concerning the delay in arraignment of the petitioners (2767-2768):

"I charge you further that it was the duty of the police to arraign the defendants before the nearest Magistrate without unnecessary delay.

"I will read to you Section 165 of the Code of Criminal Procedure, which provides as follows:

That the defendant must in all cases be taken before the Magistrate without unnecessary delay.

"If you find that the arraignment of the defendants was delayed, you may consider that on the question of the voluntariness of any confession or statement, made by the defendant, Calman Cooper, and the defendant, Harry A. Stein. However, I am

charging you that the failure to arraign, in and of itself, is not conclusive against the People, and does not in and of itself, standing alone, destroy the validity of the confession. On the question of whether or not the defendant Harry A. Stein and the defendant Calman Cooper were coerced, you may consider whether or not either of them made any complaints at the time of the arraignment, either to the Magistrate when arraigned, or to the jail physician when examined.

"And I also charge you that evidence, as to arraignment, if true, is not, however, conclusive as against the defendants Harry Stein and Calman Cooper. I again charge you that you may consider, or this jury may consider it on the issue of whether or not the confessions were voluntarily made or were involuntarily made. If you find that any one or all of these confessions—and I have charged this before—were involuntarily made, I charge you you must disregard them in their entirety."

In fact, at page 2777, the Trial Judge instructed the jury that the delay in arraignment of all of the petitioners was unnecessary as a matter of law.

The Trial Judge also carefully protected the rights of the non-confessing petitioner, Wissner, as well as those of the petitioners, Cooper and Stein, when he impressively admonished the jury at pages 2769 and 2770 that statements made by one defendant are binding solely upon that defendant and no one else:

"And I say to you that it is the law of this state that in determining the question of guilt of the defendants or any one of them, you are not to consider a statement by one defendant as any evidence against the other defendant. I say to you that the alleged statement made by the defendant Calman Cooper cannot be considered by you as evidence

against the defendant Nathan Wissner or Harry Stein, and I say to you further and charge you that the alleged statement made by the defendant Harry A. Stein cannot be considered by you as any evidence whatsoever against the defendant Calman Cooper or against the defendant Nathan Wissner. Such statements are to be given such weight as you consider proper, if you consider them voluntarily made, but only as against the defendant who made them."

At other times during the trial, prior to his final charge to the jury, the learned trial Judge repeatedly gave the same admonition to the jury:

"Mr. Segal: May I ask your Honor at this time to remind the jury that whatever Stein may have said at that time, if he said anything, must not be held against my client Wissner?"

The Court: I charge the jury at this time that any statement or alleged statement made by Stein, if believed, is binding only as against him. It is not in evidence as against the other two defendants at this trial, and you must not consider it as evidence as to the other two defendants.

Will you follow that instruction, ladies and gentlemen?"

At page 1456:

"The Court: I will now instruct the jury: I say, ladies and gentlemen, as to the defendant Calman Cooper, if this statement be in the nature of a confession as to what occurred on the afternoon of April 3rd, 1950, it is only binding as against Calman Cooper; it is not in any wise binding upon the other two defendants in this trial, and that is the law of this State and you must accept it. It is not evidence as against Mr. Stein, if his name should be mentioned, and not evidence as against Nathan Wissner.

if his name is mentioned; it is only binding as against —if believable—it is only binding as against the defendant Calman Cooper."

At page 1994:

"Mr. Sabbatino: As to Cooper, I ask at this time that your Honor instruct the jury that this alleged statement by Stein is admissible, or should be considered by the jury only as to him, if they come to the conclusion that the statement is a voluntary statement, not induced by fear, and that as to Cooper it has no evidentiary value whatsoever."

The Court: Mr. Foreman and ladies and gentlemen of the jury, I now instruct you in regard to this statement or alleged statement: If you find that it was of a voluntary character, and if you find it credible, the testimony of this witness, then you may consider it only as binding upon the defendant Harry A. Stein; it does not constitute any evidence whatsoever, it has no probative value whatsoever as against the defendant Nathan Wissner or the defendant Calman Cooper. That is the law of this case."

At pages 1942-1943:

"Mr. John O'Brien: May I ask your Honor to instruct the jury that nothing that Stein says in his confession is binding on Cooper?"

The Court: I will charge the jury as to the effect of any alleged or proposed statement made by Mr. Stein; it is only binding as against Mr. Stein, and Mr. Stein alone, if voluntary, and if believed; it does not constitute evidence against the other two defendants, if their names happen to be mentioned therein. That is the law of this case, and I shall further instruct the jury as to that law at the close of the case."

At page 1967:

"The Court: I will allow the statement into evidence, subject to the deletions which were made in chambers, with all counsel present, and I will say again to the jury and charge them, that the law of this case is that if the statement is of a voluntary character, which will be submitted to you as a question of fact, it is only binding as against the defendant Harry Stein and does not constitute any evidence whatsoever as against the defendant Nathan Wissner or the defendant Calman Cooper. That is the law of this case and you will abide by the law, as you are bound to do so under your oaths. I will allow it into evidence, subject to the deletions already made."

At page 2245:

"Q. At that time did you have a talk with Wissner? A. Yes.

Q. Can you tell us what you said to him and what he said to you? A. Yes, I said to him that both Cooper and Stein—

"Mr. O'Brien: I object to anything about what he said about the defendant Stein, on the ground that it is incompetent and not binding on the defendant Stein.

The Court: It is not binding on Mr. Stein, that is true—whatever Mr. Wissner said; it is only binding, if it constitutes admission voluntarily made, upon the defendant Wissner."

It is difficult, indeed, to conceive of any further efforts that could have been exerted by the trial Judge to protect the rights of all of the petitioners in connection with the confessions of Cooper and Stein and the delay in arraignment of the petitioners.

Professor Wigmore (Cf. *Wigmore on Evidence*, Third Edition, Vol. VII, Sec. 2100 (d) page 496) sets forth the well-accepted practice in the United States of admitting in evidence confessions of defendants in which non-confessing defendants are named:

“(d) Since Confessions are not admissible against third persons (*ante*, §§1076, 1079), the *names of other co-indictees*, mentioned in a confession used and read against the party making it, were by most English judges ordered to be omitted. But by other judges the names were ordered read and the jury instructed not to use the confession against them. In Canada and the United States the latter practice is favored.”

United States v. Ball, 163 U. S. 662, *Johnson v. United States*, 82 Fed. (2d) 501, and *People v. Fisher*, 249 N. Y. 419, 164 N. E. 336, are cited by Professor Wigmore. In the *Fisher* case three defendants were tried jointly. One of them never admitted his guilt. The Trial Court denied motions for separate trials and the confessions of the two confessing defendants were received in evidence under proper instructions that they were not binding on the non-confessing defendant.

People v. Doran, 246 N. Y. 409, also stands for the same proposition. Here the confession of the co-defendant, Harrington, was read to the jury although it contained frequent references to Doran's participation in the murder (Cf. Record on Appeal to New York Court of Appeals, folios 5755-5912). The conviction of Doran was affirmed.

This disposes of the contentions of the non-confessing petitioner, Wissner, in the cases at bar.

Wissner claims unfairness by the District Attorney in reading a particular portion of the confessions during his

summation. This argument claims that the District Attorney's explanation to the jury that this was done to answer an argument of Wissner's counsel that "Dorfman was not the driver in the confession" (2697) was merely a pretext. The District Attorney had every right to answer the challenge made by Wissner's counsel that Dorfman's role of the driver was fabricated by him in August and was not in the confession (2573-2574). While the reading of portions of the confession by the District Attorney is now criticized, Wissner's counsel then invited the jury to scrutinize them (2574).

To argue that a jury, under the proper instructions of the Court existing in this case, were unable to make the simple decision that the confessions of Stein and Cooper could not be used against Wissner in deciding his guilt or innocence, is to denounce the jury system. Under this fallacious theory of Wissner, a jury could never fairly sit in a criminal case involving a joint trial of two or more defendants where at least one of the defendants had confessed his guilt. Such a specious argument answers itself.

Conclusion.

We respectfully submit:

(1) That all of the petitioners were accorded a fair trial in accordance with the due process clause of the Fourteenth Amendment and in accordance with the New York Penal Law, the New York Code of Criminal Procedure, the decisions of the New York Court of Appeals and of the Supreme Court;

(2) That the confessions of Cooper and Stein were freely and voluntarily made, and that those issues were properly submitted to the Jury under well-accepted legal instructions of the trial Judge;

(3) Wissner has no standing on this application. Reference to him in the Cooper and Stein confessions were binding only upon the confessors and not upon Wissner. The trial Judge so instructed the jury under approved New York law.

The Three Petitions Should Be Denied.

Dated, White Plains, New York, August 28, 1952.

Respectfully submitted,

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Appendix A.

UNITED STATES CONSTITUTION, AMENDMENT XIV, Section 1:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Appendix B.

Section 1044, Subdivision 2, of the Penal Law of the State of New York:

“§1044. Murder in first degree defined.

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise.”

Appendix C.

Section 1045 of the Penal Law of the State of New York:

“§1045. Punishment for murder in first degree:

Murder in the first degree is punishable by death, unless the jury recommends life imprisonment as provided by section ten hundred forty-five-a. As amended L. 1937, c. 67, §1, eff. March 17, 1937.”

Appendix D.

Section 1045-a of the Penal Law of the State of New York:

“§1045-a. Life imprisonment for felony murder; jury may recommend.

A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ~~ten~~ hundred forty-four, may, as a part of ~~its~~ verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life. Added L. 1937, c. 67, §2, eff. March 17, 1937.”

Appendix E.

Section 165 of the Code of Criminal Procedure of the State of New York:

“§165. Defendant, upon arrest, to be taken before magistrate.

The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night. As amended L. 1882, c. 360, §1; L. 1887, c. 694. Eff. 20 days after June 24, 1887.”

Appendix F.

Section 391 of the Code of Criminal Procedure of the State of New York.

“§391. Separate trial of defendants jointly indicted defendant, jointly indicted, may be tried separately or jointly in the discretion of the court. As amended L. 1926, c. 461. Eff. July 1, 1926.”

Appendix G.

Section 395 of the Code of Criminal Procedure of the State of New York.

“§395. Confession of defendant, when evidence, and its effect.

A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.”

Appendix H.

Section 223 of the Executive Law of the State of New York:

“§223. DUTIES AND POWERS OF THE SUPERINTENDENT OF STATE POLICE AND OF MEMBERS OF THE STATE POLICE.

“It shall be the duty of the superintendent of the state police and of members of the state police to prevent and detect crime and apprehend criminals. They shall also be subject to the call of the governor and are empowered to co-operate with any other department of the state or with local authorities. They shall have power to arrest, without a warrant, any person committing or attempting to commit within their presence or view a breach of the peace or other violation of law, to serve and execute warrants of arrest or search issued by proper authority and to exercise all other powers of peace officers of the state of New York. Any such warrants issued by any magistrate of the state may be executed by them in any part of the state according to the tenor thereof without indorsement. But they shall not exercise their powers within the limits of any city to suppress rioting and disorder except by direction of the governor or upon the request of the mayor of the city with the approval of the governor.”

Appendix I.

United States Code, Section 1257, subdivision 3:

“§1257. STATE COURTS; APPEAL; CERTIORARI.

“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

“(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

June 25, 1948, c. 646, 62 Stat. 929.”

DEC 17 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

Nos. 391, 392, 393.

CALMAN COOPER, HARRY A. STEIN and
NATHAN WISSNER,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

RESPONDENT'S BRIEF.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1952.

Nos. 391, 392, 393.

CALMAN COOPER, HARRY A. STEIN and NATHAN WASSNER,
Petitioners,
against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

RESPONDENT'S BRIEF.

Statement.

All of the petitioners seek a review of the judgments of the County Court of Westchester County, State of New York, entered on December 27, 1950, sentencing them to death. These judgments were entered upon the verdicts of a jury rendered in said Court on December 21, 1950, finding all of the defendants guilty of the crime of murder in the first degree as defined by that portion of Subdivision 2 of Section 1044 of the Penal Law of the State of New York commonly known as "felony murder". Under the mandate of Section 1045 of the New York Penal Law perpetrators found guilty of this crime must be punished by death unless the jury, as part of its verdict, recom-

mend that such defendants be imprisoned for the terms of their natural lives (cf. Sec. 1045-a, New York Penal Law). The jury in the case at bar made no such recommendation as to any of the petitioners (2792). (Numerals in parenthesis in this brief refer to the pages in the certified Record on Appeal to the New York Court of Appeals, pursuant to the provisions of Subdivision 3 of Rule 27 of the Rules of the United States Supreme Court.)

The joint jury trial of the three petitioners consumed some seven weeks, having commenced on November 1, 1950, and terminated on December 21, 1950.

On March 6, 1952, the seven Judges of the New York State Court of Appeals unanimously affirmed the judgments of conviction as to all of the petitioners (*People v. Cooper, et al.*, 303 N. Y. 856; Official Edition, Weekly Advance Sheets, April 5, 1952; 104 N. E. (2d) 917). No opinion was handed down by the Court of Appeals.

On April 18, 1952, the Court of Appeals entered an order on motion of the petitioners herein amending the remittitur to read as follows:

"Questions under the Federal Constitution were presented and necessarily passed upon by this Court, viz.:

(1) whether the admission in evidence of the confession of the defendant Cooper violated his rights under the Fourteenth Amendment to the Constitution of the United States;

(2) whether the admission in evidence of the confession and the prior and subsequent oral statements of the defendant Stein violated his rights under the Fourteenth Amendment of the Constitution of the United States;

(3) whether the admission in evidence of the confessions of the defendants Cooper and Stein violated the rights of the defendant Wissner under the Four-

teenth Amendment of the Constitution of the United States;

(4) whether the refusal to sever the trial of the defendant Wissner from that of the defendants Cooper and Stein violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the United States;

(5) whether the refusal of the trial judge to delete from the confessions of defendants Cooper and Stein all references therein made to the defendant Wissner as a participant in the crime violated the rights of the defendant Wissner under the Fourteenth Amendment of the Constitution of the United States. This Court held that "the rights of the defendants under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied" (cf. 303 N. Y. 982; 106 N. E. (2d) 63).

On April 7, 1952, Mr. Justice Jackson of this Court granted a stay of execution of the death sentences pending a determination of the present applications.

Wrts of Certiorari, were granted to all of the petitioners on October 13, 1952, limited to the question, as to the admissibility of the confessions.

Questions Presented.

(A) By Petitioner, Calman Cooper.

(1) Cooper contends that the admission in evidence of his confession (Peo. Ex. 59, 1521-2874) admitting his participation in the hold-up and robbery of the money truck owned and operated by The Readers Digest Association at Chappaqua, Westchester County, New York, on April 3, 1950, during which robbery Andrew Petrini was shot and killed by the petitioner, Nathan Wissner, acting in concert

with Cooper and Stein, violated Cooper's rights under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Questions Presented.

(B) By Petitioner, Harry A. Stein.

Stein contends that the admission in evidence of his confession (Peo. Ex. 64, 1968-2896) and his oral statements prior and subsequent thereto, violated his rights under the due process clause of the Fourteenth Amendment.

Questions Presented.

(C) By Petitioner, Nathan Wissner.

(a) Wissner contends that the admission in evidence of the Cooper and Stein confessions deprived him of his right to due process guaranteed by the Fourteenth Amendment.

(b) This petitioner also urges that the refusal of the Trial Judge to delete all references to his participation in the felony murder from the Cooper and Stein confessions also deprived him of due process.

Outline of the Respondents' Contentions.

The People of the State of New York urge that all of the petitioners were justly convicted for the following reasons:

(1) The confessions of the petitioners, Cooper and Stein, were lawfully obtained under New York law (Sec. 395, N. Y. Code of Criminal Procedure); and in accordance with the requirements of the due process clause of the Fourteenth Amendment to the United

States Constitution, and in harmony with the well considered decisions of this Court and of the New York Court of Appeals.

(2) Not one of the three petitioners testified at the trial at which they were all found guilty of murder in the first degree, resulting in the judgment of death being imposed upon all of them. The jury did not recommend life imprisonment as it might have under Section 1045-a of the New York Penal Law.

By such failure to testify before the Trial Judge and Jury, the three petitioners, all represented by able counsel, deliberately refused to assist the Judge and Jury in determining whether or not the typewritten confessions of Cooper and Stein were coerced. Instead, they choose to rely on statements, allegations and arguments of counsel at the trial and in the briefs to this Court on this application, all of which, of course, do not meet the requirements of legal proof. Innuendo and surmise are offered as substitutes.

(3) Not one other witness appeared on behalf of any of the three petitioners at their trial who testified that any one of them had been beaten, threatened, coerced or intimidated in any manner by the New York State Police or the New York City Police or anyone else from the time of their arrests until the typewritten confessions of Cooper and Stein were taken and executed by these petitioners at the Headquarters of the New York State Police in Westchester County, New York, the County in which the three petitioners participated in the robbery of the money truck owned and operated by The Readers Digest Association which resulted in the felony murder of Andrew Petrini, an unarmed messenger on the truck.

Petrini had been shot through the head by the petitioner, Wissner, without warning, at the beginning

of the holdup, within a few moments after another truck driven by the petitioner, Cooper, and in which the petitioner, Stein, was riding with the accomplice Dorfman, cut off the Readers Digest money truck on a private road on the Readers Digest property in Westchester County on April 3, 1950 and brought it to a halt. The petitioner, Wissner, lay in wait at this rendezvous by prearrangement with Cooper and Stein. Wissner used an automatic pistol in murdering Petrini. Stein was armed with a revolver. No resistance had been offered by the victim.

The three petitioners, and their accomplice, Benny Dorfman, who testified against them on the trial, succeeded in looting the Readers Digest truck of money and checks, escaping to Brooklyn, New York City, and dividing the loot at the home of Dorfman within a few hours after the murder, as will be shown, *infra*.

(4) The parole official and the police officers who obtained the confessions of the petitioners, Cooper and Stein, as well as the other witnesses, testified under oath that these confessions were freely and voluntarily given.

(5) The trial Judge, under well-accepted legal principles, submitted to the jury the question as to whether the confessions of Cooper and Stein were voluntary in accordance with New York law (New York Code of Criminal Procedure, Sec. 395; *People v. Doran*, 246 N. Y. 409, at 423), and in accordance with the mandate of this Court in *Lyons v. Oklahoma*, 322 U. S. 596 at 601, where the majority held:

"The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process. *Lisenba v. California*, 314 U. S. 219, 239-241; *Wan v. United States*, 266 U. S. 1, 14. The question of how specific an instruction in a state Court must be upon the in-

voluntary character of a confession is, as a matter of procedure or practice, solely for the courts of the state. When the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process, under the Fourteenth Amendment, are satisfied and this Court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness. The instruction given satisfies the legal requirements of the State of Oklahoma as to the particularity with which issues must be presented to its juries, *Lyons v. State*, 138 P. (2d) 142, 164, and in view of the scope of that instruction, it was sufficient to preclude any claim of violation of the Fourteenth Amendment."

The instructions to the Jury in the case at bar by the presiding trial Judge on this issue are quoted *infra*.

(6) The actual killer, Wissner, who murdered Petrini without warning at the inception of the robbery, is an intruder and interloper upon the due process clause of our Fourteenth Amendment. He never vouchsafed a confession of his participation in the murder, either orally or in writing. He did not testify in his own behalf on the trial or on behalf of the petitioners, Stein and Cooper. He chose to forego his precious right to take the stand and assert his innocence before the trial judge and the jury. He also refused to testify as to any alleged violence or intimidation on the part of the police or anyone else.

On the trial, the petitioner, Wissner, was identified as the killer of Petrini by Waterbury, the driver of the Readers Digest money truck. Waterbury also pointed out petitioner, Stein, on the trial as the one who had tied him up during the robbery. The accomplice, Dorfman, on the trial, also pointed out Wissner, Cooper and Stein as the other three participants in

the holdup and robbery which resulted in the felony murder of Andrew Petrini.

(7) The admission in evidence of the typewritten confessions of the petitioners, Cooper and Stein, in which references are made to the participation of Wissner in the felony murder of Andrew Petrini met the requirements of due process, because the trial judge admonished the jury time and time again that such confessions were binding and admissible only against the person or persons who made them. In challenging this procedure, counsel for the killer, Wissner, inferentially denounce our Jury System and say, in effect, our juries are too stupid to take instructions from the trial judge. Such a vicious argument answers itself. The procedure on this trial met the requirements of due process.

(8) The denial of a separate trial to the petitioner, Wissner, met all the requirements of due process and was based upon the sound discretion of the trial Judge.

People v. Snyder, 246 N. Y. 491;

People v. Fisher, 249 N. Y. 419;

People v. Feolo, 282 N. Y. 276;

cf. Sec. 391, New York Code of Criminal Procedure.

In *People v. Snyder*, *supra*, Judge Lehman, writing for the unanimous Court, referred to the rule laid down in *U. S. v. Marchant*, 4 Mason 258, affirmed 25 U. S. 480, in the following language:

"Section 391 of the Code of Criminal Procedure as recently amended (L. 1926, ch. 461) provides that defendants jointly indicted may be tried separately or jointly in the discretion of the court. It may be assumed that the Legislature did not intend to leave arbitrary choice to the court. Discretion involves

the exercise of a sound judgment, and its attempted exercise may be reviewed by an appellate court, at least where the appellate court has jurisdiction to pass upon questions of fact. The Statute has merely restored the common-law rule that a separate trial of defendants who were jointly indicted might not be demanded as a matter of right by the accused but might be ordered in its discretion by the court. (People v. Howell, 4 Johns, 296; People v. Vermilyea, 7 Cow. 108). That rule prevailed not only in England but in this State until changes in this State in 1829 by statute. (See People v. Doran, 246 N. Y. 409.) In U. S. v. Marchant (4 Mason, 258; affd., 25 U. S. 480), Mr. Justice Story has reviewed the history of the exercise of the power of the court to grant a separate trial to persons jointly indicted. He pointed out that at common law as developed in England, persons jointly indicted might be jointly tried unless the court in its discretion ordered that each defendant should be tried separately; though the difficulty of obtaining a jury at a joint trial, if each defendant insisted upon the exercise of his right to interpose the full number of peremptory challenges accorded to him under the law of England, gave rise to a general custom of ordering separate trials unless the defendants agreed to join in all peremptory challenges.

"Since that case all jurisdictions in this country have accepted the rule that defendants jointly indicted are not entitled to separate trials unless the court in the exercise of its discretion so orders. Appellate courts in various jurisdictions have at times reviewed such orders. No general rule limiting or governing the exercise of the court's discretion can be deducted from these decisions. The Legislature has not seen fit to set fixed bounds to the exercise of the discretion it has restored to the courts.

The courts should apply but one test. Will a separate trial impede or assist the proper administration of justice in a particular case and secure to the accused the right of a fair trial? The decision of the trial court rendered before the trial is dictated by a reasonable anticipation based on the facts then disclosed. The decision of this court rendered upon a review of the trial itself rests upon determination of whether the prophesy has been realized."

In *People v. Snyder*, 246 N. Y. 491, both defendants were tried jointly and the confessions of both defendants were received in evidence. The denial of a separate trial to Wissner related to a procedural question under the New York Code of Criminal Procedure, Sec. 391. Such denial was affirmed by the New York Court of Appeals. Due process is not involved in such denial.

General Outline of the Case.

The following fact material is supplied to aid the Justices of this Court in deciding that the three petitioners were justly convicted in Westchester County, New York, of the felony murder of Andrew Petrini in that County on April 3, 1950:

Andrew Petrini was employed by the magazine, Reader's Digest, to ride on a truck from its plant in the Town of New Castle, County of Westchester, New York, to the Post Office and the bank, assisting in handling delivery of mail and money sacks and other parcels (199). On April 3, 1950, in the same town he was shot to death by the petitioner, Nathan Wissner (28) during a robbery in which money and checks were taken. Another truck, which intercepted and cut off the Reader's Digest truck was driven by the petitioner, Calman Cooper (546-548-553). The driver of the Reader's Digest truck, Waterbury, was tied up by the petitioner, Harry A. Stein (218).

A fourth conspirator, Benny Dorfman, took the wheel of the Reader's Digest truck and drove it to a secluded lane (559). The case of this defendant was severed, and he testified for the People.

WILLIAM WATERBURY, testified that he was 26 years of age, married, had been in the United States' Army and had worked for the Reader's Digest for more than five years as a truck driver whose duties included taking Andrew Petrini to the bank with money to be deposited (198-199). On April 3, 1950, this witness carried two of the bags which contained the checks and were intended for the Railway Express office and Andrew Petrini carried the small bag with the cash in it down to the Reader's Digest truck parked in front of the main building (204-205, see photograph, People's Exhibit No. 7 at page 2809). These bags were put in the right hand side of the Reader's Digest truck and Andrew Petrini sat on a small cushion with his back to the windshield (213-214). Neither Waterbury nor Petrini was armed (214).

This truck left the front of the Reader's Digest Building and started out its driveway to the highway known as Route 117 but another truck in front of Waterbury kept cutting him off and finally forced him to stop and then the witness Waterbury saw the petitioner Wissner making a last step towards the door on Petrini's side and Wissner grabbed the door and it did not open. Then the defendant Wissner shot Petrini and came through the door and ordered Waterbury to get into the back of the truck, where he was tied up by the defendant Stein (215-216-218). The truck then was driven off by someone whom he did not see to a road where it was left (216-217). Andrew Petrini, when the shot was fired, had slumped over and was bleeding and there was a hole in the glass window of the door which had not previously existed (219, see People's Exhibit 18 in Evidence at p. 2827). Waterbury noticed after the robbers had left that the bags containing the checks and the money

were gone (219). The gun used was described by the witness as a revolver (221). Andrew Petrini died at about 10:10 P. M. on April 3, 1950 (167). Except for the bullet wound the body was found to be normal and the cause of death was given as firing a bullet into his head (172).

The proof established that the idea of holding up the money truck of the Reader's Digest Association originated in the mind of petitioner Cooper (2053-2055-2056-2874).

(1) The Brassett Testimony.

The People's witness, Brassett, testified that he and petitioner, Calman Cooper, had been inmates at the Federal prison in New York City in 1949, the year before the murder in question. Brassett had been sentenced for mail theft, having stolen money from mail addressed to the Reader's Digest in Pleasantville, New York. Brassett pointed out Cooper on the trial and stated that he had met Cooper at the Federal prison in New York City after Christmas of 1948. Brassett and Cooper continued as inmates together for approximately five or seven months until the summer of 1949. They worked together and spent their recreation time together in prison (2053-2056).

Brassett told Cooper about the mail route, the pouches of mail, the volume of business of the Reader's Digest and that if Brassett "wanted to make a big haul," he "could make it through the Digest and really make something out of it for the rest of my life" (2056-2057). Cooper and Brassett also discussed the money carried on the Reader's Digest truck, and the routine of the truck (2058-2059).

(2) The Witness, Jeppeson.

On April 3, 1950, the day of the crime, and for sometime prior thereto, Arthur L. Jeppeson was employed at the Spring Auto Renting Company, at the corner of Spring and Thompson Streets, Manhattan, New York City. Jeppe-

son identified People's Exhibit 20 (223-2828), a photograph of a 1937 Chevrolet carryall truck, the truck used in the hold-up of the Reader's Digest truck, as one that he had rented to Cooper on four occasions, March 11, 18, 25 and April 3, 1950, the day Andrew Petrini was murdered. Cooper rented the truck under the name of Walter W. Comins and exhibited an operator's license No. 1434549 in the name of Walter William Comins (779-785) (People's Exhibits 41-42, 2852-2854). After Cooper rented this truck from Jeppeson at ten or ten-thirty on the morning of the crime, it was never returned to Jeppeson up to the time of the trial (786). People's Exhibit 37 (695-2845), is a reproduction of the application for the New York State Operator's License in the name of Walter William Comins, No. 1434549. The People's Witness, Perlmutter, of the New York State Motor Vehicle Bureau, established that an operator's license No. 1434549 was issued on November 3, 1949, pursuant to the application, People's Exhibit 37. The police were in contact with Jeppeson on the night of April 3, 1950, shortly after the commission of the crime, because this rented truck was abandoned by the three petitioners near the scene of the crime, was found by the State Police, and traced to Jeppeson.

Some two months later, on June 5, 1950, just a few moments before Cooper's arrest, Jeppeson saw Cooper on 120th Street, between Morningside and Amsterdam Avenues, Manhattan, New York City. Jeppeson had received a call from the State Police by previous arrangement. Jeppeson walked towards Cooper on 120th Street and Cooper touched Jeppeson on the arm. Cooper then told Jeppeson: "that this truck that he rented from me was in a killing upstate and he had nothing to do with it" (788-789).

Jeppeson then asked Cooper: "Why the hell didn't you report it to the police," and "I asked him about the license, what became of the license, why did he give me that

license", and Cooper said: "That is the license they give him to give me" (789). Cooper also asked Jeppeson if he had been shown any photographs of Cooper and Jeppeson "told him yes". Cooper entreated Jeppeson not to identify him and Jeppeson promised that he would not (790).

Of course, Cooper was not in custody at this time on the morning of June 5, 1950. No threats, fear or force had been exerted against him. No promises had been made to him. He was at liberty on the streets of New York City. What inferences, except those of guilt, could the triers of the facts draw, observing Jeppeson, the honest businessman, as he gave this crushing evidence against Cooper? For all practical purposes, Cooper had admitted guilty knowledge to Jeppeson. The character and integrity of Jeppeson was unimpeached.

A detective was following Jeppeson during this incident and Jeppeson nodded to him (789). It was at this time that Sergeant Sayers and Sergeant Barber of the State Police closed in and took Cooper into custody (790-791).

According to Sergeant Sayers, this arrest took place sometime about 9:15 on the morning of June 5, 1950 (1310-1311). As Sergeant Sayers, in the company of Sergeant Barber of the State Police accosted Cooper, Cooper had his hand in his right-hand coat pocket. After identifying himself and his companions as police officers, Sergeant Sayers ordered Cooper to take his hand out of his pocket. Sergeant Sayers felt an object in Cooper's pocket. Sergeant Sayers then grabbed Cooper by both arms, and as Cooper started to wheel around, Sayers threw Cooper against the building which had a cement wall and then took Cooper into custody (1311).

The extent of any injuries that Cooper may have sustained during this violent episode at the time of his arrest is unknown.

(3) The Witness, William Cooper.

Called by the People, William Cooper testified that he is the brother of the petitioner, Calman Cooper (696). He also used the name Walter William Comins (697).

William Cooper, or Comins, admitted that he made the application for an operator's license, People's Exhibit No. 37 (698), under the name of Walter W. Comins. This is the operator's license used by the petitioner, Cooper, to hire from Jeppeson, the truck used in the robbery of the Reader's Digest money truck.

William Cooper also registered at the Edison Hotel, 227 West 47th Street, New York City, on November 1 and 2, 1949, under the name of W. W. Comins and he received the operator's license in the mail at the Edison Hotel (698-699), although his home was in Jamaica, Long Island (701).

William Cooper or Comins went to the Federal Prison, New York City, on January 6, 1950, and was still incarcerated there on November 17, 1950, when he testified on the trial in the instant case. He stated that when he went to prison he left the operator's license with his papers at home (700-701).

(4) The Witness, Estelle Norma Cooper.

She is the wife of William Cooper. She had lived with her husband for six years prior to January, 1950. She knew the petitioner, Calman Cooper, and saw him at her home several weeks after her husband was sentenced to Federal Detention Headquarters in January, 1950. The petitioner, Cooper, came to her home several times in January and February, 1950, and several times in March, 1950. The petitioner, Cooper, had access to William Cooper's

papers on these visits and assisted in the administration of William Cooper's affairs during February and March, 1950 (703-704). The People urged on the trial that it was during this period that the petitioner, Cooper, appropriated the operator's license illegally obtained by his brother, William Cooper or Comins, and used it to rent the truck used by the three petitioners in the hold-up of the Reader's Digest money truck.

(5) The Accomplice, Dorfman.

Dorfman, who testified for the People, had no prior criminal record. He and Wissner were partners in the automobile rental business in New York City on the day of the crime and for some months prior thereto (486-487).

Dorfman knew the petitioners, Cooper and Stein, having met them about six weeks prior to the commission of the crime at Dorfman and Wissner's place of business. Cooper and Stein were together (488). Dorfman, Cooper and Stein had visited the scene of the crime and its vicinity at least three times before the day of the hold-up and watched the operations of the Reader's Digest money truck on the highway and in the vicinity of the Post Office in Pleasantville. Cooper, Stein and Dorfman discussed the operations of the truck on these occasions (491-495). Cooper drove the Spring Auto Rental truck which he had rented from Jeppeson, (People's Exhibit 9, 2812), on these occasions and on the day of the crime (489-543-1625). Cooper carried the guns on these trips (504). Cooper discussed the hold-up plans with Dorfman and Stein (505).

Dorfman placed Cooper in the company of Wissner and Stein on the day of the crime before starting out from Manhattan. Cooper drove the Spring Rental Truck to the scene of the crime and drove it during the time that it cut off the Reader's Digest truck. Cooper drove the Spring Rental truck from the scene of the hold-up and shooting to a point where a "get-away" Chevrolet car had been parked.

Cooper then drove in the Chevrolet passenger car to the place where Dorfman had driven the Reader's Digest truck with Wissner, Stein and Waterbury in the rear. The petitioners, Wissner and Stein, then entered the Chevrolet "get-away" car driven by Cooper (562). Cooper also carried the tan valise (People's Exhibit 28) with three guns in it (536-562).

Dorfman also placed Cooper, Stein and Wissner in the Chevrolet sedan on the ride to the Bronx, New York City, subway after the robbery and shooting was completed. Cooper drove for a while and then Wissner took over (562).

Cooper boarded the subway in the Bronx with Dorfman, Stein and Wissner (568). Cooper finally arrived at Dorfman's apartment in Brooklyn with Dorfman, Stein and Wissner about 5:30 P. M. Dorfman's wife was at home with their children. Stein and Cooper had the valises. Cooper took part in dividing the loot in Dorfman's apartment. Then Cooper and Stein left (569-572).

(6) The Witness, Regina Dorfman.

She saw Cooper enter her apartment with Wissner, Stein and her husband, the accomplice Dorfman, between five and six P. M. on the day of the crime (948).

Either Cooper, Stein or Wissner carried the tan valise, People's Exhibit 28 (536-2834), in which the fragment of the Reader's Digest Discount Certificate was found later by the State Police (950). Cooper and Stein were introduced to her (951).

Cooper went into a bedroom with Dorfman, Stein and Wissner. Cooper and Stein left together within an hour (951-953).

(7) The Witness, Michael Homishak.

Homishak, who had shared space with the petitioner, Wissner, and the accomplice, Dorfman, at their place of business in New York City, saw petitioner, Cooper, with

Stein, Wissner and Dorfman at the Wissner-Dorfman automobile rental agency at times during the six-weeks just prior to the robbery and murder (887-888).

Homishak also saw Cooper in the company of Stein, Wissner and Dorfman at 11 A. M. on the morning of the day of the crime in the vicinity of the Wissner-Dorfman rental agency (889-890).

Cooper left the premises with Wissner and Stein before noon on the day of the crime (890). Homishak did not see Cooper again that day.

Andrew Petrini was shot to death during the hold-up of the Reader's Digest truck at approximately 3 P. M. that day (205-211).

The Confessions and Admissions of the Petitioners, Cooper and Stein, Were Properly Received in Evidence.

AS TO THE CONFESSION OF COOPER.

The confession of Cooper (People's Exhibit 59, 2875), was admitted in evidence (p. 1521) after the deletion of certain references to the petitioners, Stein and Wissner. Cooper recites in this confession intimate details that could not possibly be known to anyone except a participant in the crime.

Cooper's confession takes up approximately eleven pages of the record. It was taken in the presence of New York State Parole Commissioner Edward J. Donovan and John P. Reardon, the District Assistant Director of the New York State Parole Board, Trooper Buon, Corporal McLaughlin and Sergeant Sayers of the State Police and notarized by Sergeant Barber of the State Police.

Cooper not only disclosed his association with Brassett but also revealed his renting from Jeppeson of the Spring Auto Rental Truck used in the crime, under the name of W. W. Comins, the preliminary visits to survey the scene

of the planned crime, the routine of the Reader's Digest truck, his participation in the crime, the flight and disposition of the loot (pp. 2875-2888).

Corporal McLaughlin, who typewrote Cooper's confession in the presence of Cooper while the questions were being addressed by Sergeant Sayers (1171), testified that no force or threats were used against Cooper nor were any promises made to him (1174). Cooper signed the confession in the presence of Corporal McLaughlin and Cooper made corrections in his own handwriting after reading the confession (1172-1173).

Troopers Hess and Leon testified they had taken turns in guarding the defendant Cooper from his arrival at the State Police Headquarters to the taking of the confession, and that they had brought to Cooper the same food that was served to the troopers at each meal, and that a mattress was brought in and Cooper slept on the night of June 5th (confession was made on evening of June 6th) on a mattress from approximately 12:30 A. M. to after 8 A. M. (1387-1405, 1412-1439).

The report of Trooper Leon relating to the period during which he guarded Cooper (Peo. Ex. 63 for identification, marked at p. 1544), was read by the trial Judge who ruled that he found nothing contradicting the testimony of Trooper Leon (1571).

District Assistant Director John T. Reardon of the New York State Board of Parole, and an Assistant to Parole Commissioner Donovan, testified as to his presence in the headquarters of the State Police in Westchester County on the evening of June 6, 1950, at 8:00 P. M., when he conversed with Cooper at Cooper's request (1442-1447). (This negatives assertions in petitioners' briefs that the petitioners were held incommunicado.) Reardon declared that at this time Cooper did not complain to him that he had been beaten or threatened (1449).

Reardon noticed no wounds, cuts or bruises on Cooper on the evening of June 6 (1449).

Reardon's testimony at pages 1452 and 1453 indicates that Calman Cooper confessed after he was assured by Parole Commissioner Donovan that his brother, Morris Cooper, would not be punished for his parole violation for being in New York State instead of Florida at the time that his brother, the petitioner, Calman Cooper, was arrested.

If Cooper confessed his guilt in the case at bar to relieve his brother, Morris, of any penalty that might follow a parole violation, such a confession is valid under Section 395 of the New York Code of Criminal Procedure.

At ten o'clock on this evening of June 6, 1950, Cooper gave an oral confession to the Parole Officer Reardon and Parole Commissioner Donovan (1453). Cooper seemed to be in normal physical condition, although a little tired. Reardon noticed no wounds, cuts or bruises and Cooper did not complain that he had been mistreated, threatened or beaten (1454). No promises were made to Cooper concerning himself (1458).

Trooper Buon and Sergeants Sayers and Barber of the State Police also denied on the stand that any threats, violence, force or promises had been exerted against Cooper (2116-2074-1319).

Trooper Buon, Corporal McLaughlin, Sergeants Sayers and Barber of the State Police and Director Reardon of the State Parole Board were all subjected to cross examination by petitioner's counsel concerning the circumstances under which Cooper's confession was taken. Despite this fact no evidence of threats, force, violence or promises was produced on these cross examinations.

In addition, Corporal Dersheimer and Troopers Dirschka and Pietrack testified on behalf of the People as to their

parts in the investigation (1095-1103), but were not cross examined by the defense as to any threats or violence. Corporals Brann and Sweeney and Trooper Crowley were produced at the defendants' request and examined by defense counsel (2372-2293-1684-2382), but they were not questioned by the defense as to any threats or beatings. Moreover, on another occasion, Sergeants Hardy and Horton, Corporal McLaughlin and Troopers Leon, Crowley and Tudesco were produced in open court by the People at the request of defense counsel during the cross examination of the Reader's Digest truck driver, Waterbury (417-419), but were not interrogated at this time as to any threats or force exerted against any of the petitioners while they were in custody and before arraignment. At page 2069 the District Attorney offered to produce any other police officers requested by the defendants.

The petitioners personally and in open court had an opportunity to view all of these officers and advise their counsel that one or more had threatened or beaten them. The best proof that these officers did not beat or threaten the petitioners lies in the fact that the defense never examined them on this issue. No witnesses called either by the People or the defense testified that any of the petitioners were threatened or beaten while in custody. Not one of the petitioners testified on the trial.

MOTIVES FOR COOPER'S CONFESSION.

Insofar as Cooper is concerned, the jury may well have found that the motivating force behind Cooper's decision to confess was the fact that Cooper knew that Jeppeson had been taken into custody with him and that Cooper knew the State Police were well aware that Jeppeson had rented the truck used in the crime to Cooper. In addition, Cooper knew that he had made a damaging statement to Jeppeson on West 120th Street, New York City, on the morning of June 5, 1950, immediately prior to his arrest. Moreover,

Cooper also knew shortly after his arrest, that the State Police must be familiar with his conversations with Brassett at the Federal Prison, New York City, concerning the Reader's Digest money truck because shortly after Cooper's arrest, Brassett was brought into the presence of Cooper at State Police Headquarters in Westchester County (1312).

Under these circumstances, the jury may have well found that Cooper realized the hopelessness of his position and decided to make the best bargain possible.

The record shows that while Cooper was in the custody of the State Police, he assisted the Police by travelling more than twenty-five miles from the State Police Headquarters in Hawthorne, New York, to Brooklyn, New York, where he pointed out the home of the co-conspirator, Dorfman, in an effort to aid in the arrest of Dorfman (2068-2069).

It was evident that the State Police closed in on Cooper quickly and suddenly on June 5, 1950, because he was about to leave for Florida (2645). Cooper also knew that his brother, Morris, had violated his parole by being in New York instead of in Florida. In fact, Morris Cooper, was taken into custody at the Air Lines Terminal in New York City shortly after Calman Cooper's arrest, while attempting to return to Florida (2039-2040). Morris Cooper, and Charles Cooper, the father of Morris and Calman, were suspects in the opinion of the State Police (1319).

It could appear quite logical to any jury that Calman Cooper, realizing that Brassett and Jeppeson were available as witnesses against him, that his brother, Morris, was in custody as a parole violator, and that his father was also detained as a suspect, and knowing that his brother and father were innocent of any complicity in the crime charged, would seek to obtain the freedom of his father and brother in exchange for a statement concerning his

participation in the crime and the parts played by the accomplice, Dorfman, and the petitioners, Stein and Wissner.

This is precisely what the petitioner, Cooper, chose to do. He requested an interview with the New York State parole authorities which was granted. He spoke with Assistant Director John T. Reardon at 8 P. M. on June 6, 1950, at Westchester County State Police Headquarters. Cooper, evidently was not satisfied that Director Reardon had sufficient authority to grant Cooper's request as to liberating his father and brother, and so one of the New York State Parole Commissioners, Edward Donovan, came to Westchester State Police Headquarters later that evening at the request of Director Reardon, and it was not until Calman Cooper was assured by Commissioner Donovan that his brother, Morris Cooper, would not be punished for parole violation, that he confessed his guilt that same evening in the presence of Director Reardon and Commissioner Donovan.

In sharp contradiction of counsel's pleas that Cooper's spirit was broken by threats and violence, this evidence would indicate to any sensible jury that Cooper was master of the situation and laid down, himself, the terms upon which he would confess his guilt of the crime charged (1316).

An attempt is made in the brief of the petitioner, Stein, to create the impression that the father of petitioner, Cooper, appeared before Cooper in handcuffs prior to the taking of the Cooper confession. The evidence shows that this occurred after Cooper had confessed (cf. 1366-1372).

The good faith of the State Police on this issue is further substantiated by the fact that Charles Cooper, the father of the petitioner, Calman Cooper, was released by the State Police on June 7, 1950, the day after Cooper confessed his guilt and a full day before the arraignment,

having been cleared of any guilt by Cooper and by the petitioner, Stein (1382).

AS TO THE CONFESSION OF THE PETITIONER, STEIN.

Compelled by the practical necessity of taking Stein into custody for the same reasons that held true in the case of Cooper; namely: the fear that Cooper might get away to Florida before the identity of those associated with Stein and Cooper in the killing on April 3, 1950, could be more definitely established, and the fear that Stein would also flee if he discovered Cooper's arrest, the State Police arrested Stein at his brother's home in New York City at 2:00 A. M. on Tuesday, June 6, 1950 (1685-1697-1957-1959). (The petitioner, Wissner, was still at large and the accomplice, Dorfman, was a fugitive.) The State Police were in plain clothes, and were accompanied by New York City Detective William Mulligan who told the petitioner, Stein, in the immediate presence of his brother, Lou, that Stein was being arrested by the State Police (1959-1697).

The State Police have jurisdiction throughout the State, and power to arrest any place in the State (1699), they are Peace Officers of the State and this crime constituted a felony (Executive Law, New York, Section 223). Moreover, New York City is within the territory of Troop K of the State Police (1903) which was investigating the case. Stein then was taken to the State Police Headquarters in Hawthorne, in Westchester County, where the crime had been committed, arriving there at about 3:00 A. M. (1689) on June 6th. He was not questioned until 10:00 A. M. June 6th, and at that time denied any connection with the killing (1904-1906).

At 2:00 A. M. on June 7th, Captain Glasheen showed a portion of Cooper's confession, which implicated Stein, to Stein and told him to "sleep on it" (1938-1939-1954). Shortly after 9:00 A. M. Captain Glasheen received a mes-

sage that Stein wanted to see him, and a little later between 10:00 and 11:00 A. M. Stein made an extended oral statement in which he gave all details and implicated himself in the hold-up (1908-1909).

After lunch the formal written confession (Peo's. Exh. 64, 1968-2896) was taken by a civilian stenographer, Mrs. Anna Klaus, in one of the offices of the State Police on June 7, beginning at about 1:30 P. M. and ending at 4:30 P. M. (1576-1579). All of the answers were made by Stein to questions put by Captain Glasheen (1578). No one had Cooper's confession there to use in prompting Stein (1939). After Stein's confession was typed, it was read by Stein and read to him, and he made corrections and initialed them (see pp. 2900 and 2902) before signing the confession (1580). Mrs. Klaus testified no force or violence was used and no promises made during the time she was with defendant taking his confession, and that he freely answered the questions (1581-1582). Her stenographic notes were read by Stein's counsel (1614-1615, Stein's Exh. CC, 1615).

Stein never complained to State Police Captain Glasheen, the Commander in New York City and adjoining Westchester County, that he had been beaten, mistreated or threatened in any manner by any of the Police Officers under his command (1913). Captain Glasheen saw no cuts, wounds or bruises on any portion of Stein's person at any time on June 6th or 7th.

The following day, June 8th, Stein went with Captain Glasheen and Trooper Crowley to the Reader's Digest property, and Stein pointed out the location from which he had observed the main entrance from which the Reader's Digest truck commenced to leave the premises on the day of the robbery and murder (1699-1702), and related on the spot how this crime had been committed, and also went over the route to point out a spot at which he and the others had thrown away the guns (1992-1996).

Again on that same evening the petitioner, Stein, was brought into a room in the State Police Headquarters, and in the presence of the District Attorney and two Assistant District Attorneys (2143), he identified one of the persons there (William Waterbury) as being the driver of the Reader's Digest truck whom Stein had tied up in the back of that truck on April 3, 1950, the day of the robbery and killing (2161). When Dorfman could not be found on Thursday, June 8, Stein along with the petitioners, Cooper and Wissner, was arraigned before a Magistrate on Thursday night, June 8th (2136), and then taken to the Westchester County Jail.

On the morning of June 9th, Stein was examined by Doctor Robert Vosburgh, attending physician at the jail, who found bruises in the left bicep area (1712, see Peo's. Exh. 65, at p. 2909). This was the examination given to all new prisoners, and did not result from any complaint or request of the defendant.

The trial Court charged the jury that the delay in arraignment of all of the petitioners was unnecessary as a matter of law (2777). In addition, the only undisputed affirmative proof of any change in Stein's physical condition related to the bruises on the very small area of the belly of the muscle of the left bicep, which could have been caused by a strong grip of one of the arresting officers at the time he was taken into custody (1737-1739). There is no proof in the entire record that these marks resulted from any beating, or that the confession and the numerous admissions flowed from them. Whatever circumstantial inferences might be drawn from these facts alone, since Stein did not take the stand to offer any proof, was rebutted by the full testimony of the questioning officer, Captain Glasheen, and the stenographer, Mrs. Klaus, and other witnesses present when the Stein confession was taken and by other police officers.

Contrary to the impression attempted to be created that Stein was held in a place where he could be coerced by questioning, unobserved by others, the civilian witness, Jeppeson, saw Stein when Jeppeson went down to get a pack of cigarettes in the room where Stein was seated (808). Apparently this was on the morning of Tuesday, June 6th, before Stein confessed his guilt. Again on Thursday, June 8th, before Stein made his identification of Waterbury, the driver of the Reader's Digest truck on the day of the murder, the witness, Regina Dorfman, saw Stein on the first floor of State Police Headquarters seated on a couch reading a paper (979). Stein then and there said that he knew Regina Dorfman, the wife of the accomplice, Benny Dorfman. Then Stein, in the presence of the District Attorney, exhibited clearly his independence of compulsion by denying he had supplied the tape and twine used in the holdup (2163).

The testimony of John Duff, of counsel for petitioner, Stein (1827), presents only an issue of fact as against the unalterable record made by Doctor Vosburgh. This resourceful and experienced attorney, who had seen Stein on June 9th, made no complaint to the County Judge of Westchester County when he was before him with Stein on June 16th when Stein was arraigned to plead to the indictment. Stein himself made no complaint to the Magistrate on the night of June 8th when he was first arraigned nor did he complain to the County Judge when he was arraigned on June 16th.

Most important of all, it appears without contradiction, that after Stein had been shown a portion of Cooper's confession he was left to "sleep on it", so that the oral statement the next morning was not the product of questioning during the night but of his own reflection. What was more natural than his own bitterness at Cooper and a desire to "get even" (2239).

MOTIVE FOR STEIN'S CONFESSION.

The motivation for Stein's confession, its efficient cause, was bitterness against Cooper for having implicated Stein. This came as a spontaneous outburst to a New York City detective on June 7th, in the evening after his confession had been given that afternoon:

"He said that 'that rotten son-of-a-bitch Cooper it is hard to believe he would put me in the way he did, he put me right into the seat, I was the best friend he ever had; well, if I must go, I will take him with me'" (2239).

This realization of full implication by Cooper is an important factor (*People v. Borowsky*, 258 N. Y. 371, 372). The Court of Appeals in referring to the confession of the defendant, Borowsky, in this case, said: "A jury might reasonably find that he yielded not to fear of violence, but to a conviction that denial of guilt was hopeless when his confederates had turned against him".

At the time Stein began to give his detailed oral statement on June 7th, Wissner had not yet arrived at State Police Headquarters (1950-1951). An effort was being made to apprehend all of the four involved in the crime and arraign all together, and this continued to the evening of June 8th, 1950 (1947, 2008, 2088, 2089, 1320, 1321, 1322, 1323) when the three petitioners were arraigned, all efforts to apprehend the accomplice, Dorfman, having failed.

The petitioner, Wissner, was not arrested in lower Manhattan, New York City, until June 7, 1950 at approximately 9 A. M., two days after the arrest of Cooper and one day after the arrest of Stein. The fourth participant in the robbery and murder, Dorfman, was a fugitive and did not surrender until June 19, 1950 long after the three petitioners had been arraigned, indicted by the Westchester

County Grand Jury and charged with the commission of the crime of murder in the first degree.

In fact a State Trooper was stationed in the Dorfman apartment in Brooklyn on the day and night of the arraignment on June 8, 1950 of the three petitioners in the hope that Dorfman might be apprehended and arraigned at the same time. This effort proved futile (2088-2089).

In the cases at bar, this Court is asked to infer that because certain bruises appeared on Stein and Cooper on June 9, 1950, that their confessions on June 6 and 7 were extorted by beatings.

In the case of Stein we have seen that the bruises on the bicep area could have been caused by the grip of a strong man, and Officer Crowley who took Stein from his apartment to the State Police headquarters weighed 225 pounds and obviously was such a husky, strong man. It was a reasonable deduction for the jury to make that in taking Stein in for the crime of murder that at some time Crowley or one of the others had a tight grip on Stein. In Wissner's case there was concealment of previous medical treatment which was inadvertently revealed when his counsel gave Captain Glasheen a chance to show that he knew from questioning other people "that Wissner, when taken into custody, had injuries, he was under a doctor's care" (2026). This having been brought out before the jury, Wissner's counsel promised to show by X-rays that this was limited to the sacro-iliac area (2027) but these were never produced although Wissner presumably could make this proof by witnesses other than himself, if he so desired. Other suspicious facts were that when viewed by the doctor at the Westchester County Jail about 10 A. M., on June 9, 1950, the morning after his arraignment, there were abrasions on Wissner's shins, which have a maximum 5-hour healing time (1772) and he reached the jail before midnight the preceding night, and also Wissner on June 12th

had injuries which were not revealed on the complete examination of June 9th (1810). Sergeant Sayers said he had thrown Cooper against a wall hard because he believed his hand held a weapon in his pocket. This was a competent cause of some of the injuries. Doctor Vosburgh, the jail physician, said that the injuries of all of these men could have been caused in a number of ways, including self-infliction (1810).

In this case the confessions of Cooper and Stein were made from understandable motives. They were fed and they slept. The detention was not for the sole purpose of obtaining a confession where no other proof existed, but was forced upon the police by the need to take Cooper into custody before he left the State, and the hope of completing the investigation within a compressed period thereafter. This was proved when the arraignment occurred on June 8, 1950, the day Dorfman was expected in New York but did not show up. Cooper's confession was given first to a New York State parole commissioner whom he had sent for. There is no proof from anyone that these confessions were the result of violence. No complaint was made to the magistrate or the District Attorney at the arraignment on June 8th, 1950, or to the jail officials who received them on the evening of June 8, 1950 after the arraignment.

Petitioners' briefs assume questioning by relays of police but the testimony showed clearly that both confessing defendants slept and the questioning was not uninterrupted (see Cooper's own brief at pages 9 and 10).

Stein was permitted to reflect after a part of Cooper's confession was read to him and he was left to "sleep on it" (1954).

There is no testimony by any petitioner or any witness that Cooper or Stein were held incommunicado. The day before the arraignment Cooper's father was out on the

streets and free to communicate with anyone. The only request was one by Stein for information as to his mother who was ill, and this was obtained for him by telephone. Despite Cooper's father's ability to retain counsel, no attorney went to State Police Headquarters or to the Court on the petitioner's behalf. Stein did not ask to see his lawyer (1930, 1938) on the question of the good faith of the New York State Police, the record shows that warrants had been issued to the State Police by the New York State Parole Officials requiring the temporary detention of the petitioners, Cooper and Stein.

Upon the record the Trial Judge's submission of the voluntariness of the confessions to the jury as a question of fact was proper. The issue of alleged coercion was clearly presented to them (pp. 2765-2769, incl.). The Trial Judge also instructed the jury that the confessions of the petitioners, Cooper and Stein, were binding only upon the confessors and no one else (2769-2770).

Argument.

(A) Delay in arraignment was insufficient to bar the Cooper and Stein confessions from the Jury.

In urging that the confessions of the petitioners Cooper and Stein should not have been received in evidence, petitioners stress the delay in arraignment of both. However, the New York Court of Appeals has consistently held that delay in arraignment, in and of itself, is not sufficient to exclude a confession.

In *People v. Trybus*, 219 N. Y. 18, at 22, the Court of Appeals reiterated the well-accepted rule in New York:

“ * * * The practice of detectives to take in custody and hold in durance persons merely suspected of crime in order to obtain statements from them

before formal complaint and arraignment, and before they can see friends and counsel, is without legal sanction. The question is not, however, whether the detective struck defendant or held him illegally in custody. Neither of these facts, *per se*, makes the reception of the statements in evidence illegal as matter of law (*Balbo v. People*, 80 N. Y. 484), although they are properly to be considered by the jury in determining the voluntariness of the statements. The question is whether defendant, voluntarily, not under the influence of fear induced by threats or under a stipulation of the district attorney not to prosecute (Code Crim. Pro. Sec. 395), made the statements."

The traditional attitude of the New York Court of Appeals on this question was well summarized in *People v. Doran*, 246 N. Y. 409 at 423:

"Reviewing this case, therefore, as a whole, I think all the issues of fact were fairly left to the jury who heard all the testimony, saw all the witnesses, arrived at their conclusion apparently after a careful and discriminating consideration, and that we are not justified in disturbing their verdict because we may be of the opinion that the district attorney should have taken the defendant's confession in Albany instead of in Watervliet, or because the police authorities in their zealously to unravel the Jackson murder did not immediately arraign the defendant after his arrest. Delay in arraignment does not exclude a confession. (*People v. Trybus, supra.*) Neither does the fact that officers of the law questioned the defendant persistently in regard to his connection with the crime (*People v. Rogers*, 192 N. Y. 331, p. 348), nor that they failed to warn him of his privileges or rights. (*People v. Kennedy*, 159 N. Y. 346, 360; *People v. Randazzio*, 194 N. Y. 147.) That the confession was sworn to is likewise no objection. (*People v. Mondon*, 103 N. Y. 211, 219).

Even when evidence has been procured through wrong acts upon the parts of officials, it is not necessarily excluded. (*Adams v. New York*, 192 U. S. 585.)"

In *People v. Mummiani*, 258 N. Y. 394, at 396, the Court of Appeals again followed the doctrine enunciated in the *Trybus* and *Doran* cases, *supra*:

"Disregard of the duty of arraignment does not avail, however, without more to invalidate an intermediate confession. (*People v. Trybus*, 219 N. Y. 18; *People v. Doran*, 246 N. Y. 309.) It is only a circumstance to be weighed with others in determining whether a confession has any testimonial value."

In *Stroble v. California*, decided April 7, 1952, 343 U. S. 5 (Law Ed. Vol. 96, 529, at 540), Mr. Justice Clark, writing for the majority of the Supreme Court Justices, held that delay in arraignment in the California Court did not constitute a denial of due process and said at page 540:

"Upon the facts of this case, we cannot hold that the illegal conduct of the law enforcement officers in not taking petitioner promptly before a committing magistrate, coerced the confession which he made in the District Attorney's office or in any other way deprived him of a fair and impartial trial."

(B) The failure of every one of the petitioners to testify as to any threats or violence exerted by the police while they were in custody leaves the record barren of the necessary proof required by section 395 of the New York Code of Criminal Procedure, and as required by the decisions of this Court.

Of course, the petitioners had every right to refuse to testify. However, by doing so they ran the risk that there would be insufficient proof that their confessions were

obtained through fear produced by threats or violence. If such illegal practices had been used, which the People deny, the petitioners themselves would have been the best witnesses on this issue.

This consideration is of the utmost importance in this case because of the great number of witnesses who denied that any threats or violence had been exerted either against Cooper or Stein at various times while they were in custody, including:

- (1) Captain Daniel F. Glasheen, Commander of Troop K, State Police.
- (2) Sergeant Richard T. Barber, State Police.
- (3) Sergeant Joseph W. Sayers, State Police.
- (4) Corporal Walter E. McLaughlin, State Police.
- (5) Trooper Thomas V. Buon, State Police.
- (6) Trooper Frank K. Hess, State Police.
- (7) Trooper Arthur Leon, State Police.
- (8) Supervisor John T. Reardon, New York State Division of Parole.
- (9) Mrs. Anna A. Klaus, Civilian Stenographer, State Police.

Every one of the persons, who had charge of Cooper or questioned him, said no threats or violence were employed.

Other troopers, Brann, Pietrack, Sweeney, and Crowley, who had custody of Stein at various times, testified and were not questioned by counsel for the petitioners as to use of force, threats or violence.

(C) The problem confronting the State Police in view of the confessions of Cooper and Stein.

Cooper had been arrested on June 5, 1950, and confessed his guilt on the evening of June 6, 1950. Stein was arrested during the early morning of June 6 and confessed his guilt on the afternoon of June 7.

The question naturally arises: Why were Cooper and Stein not arraigned on June 6 and 7 after they had confessed their guilt? The reason is obvious from the State Police viewpoint. It is not an answer to the requirements of Section 165 of the New York Code of Criminal Procedure, but it emphasizes the good faith of the State Police and negatives innuendos of threats and violence. Wissner was not apprehended in New York City until June 7. He did not reach State Police Headquarters until noon on that day. In the meantime, Dorfman, who had been named as an accomplice in the confessions of Cooper and Stein, was at large and did not surrender until June 19th. The arraignment of Cooper, Stein and Wissner, with the resulting newspaper publicity, would have constituted a signal to Dorfman to abscond. The Police were looking for Dorfman. In fact, defense counsel contend that Dorfman was a fugitive until he surrendered on June 19, 1950, after Cooper, Stein and Wissner had been arraigned before Justice Aylesworth in Chappaqua on the evening of June 8.

The best support for this reasoning is shown by the fact that People's Exhibit No. 62 (1325-2894), a photograph of the arraignment of the three petitioners on June 8, 1950, was published on the front page of at least one New York City newspaper on June 9, 1950, while Dorfman was still at large.

(D) The failure of Cooper, Stein or Wissner to complain on arraignment of any alleged threats or violence exerted against them while in custody.

Although Cooper confessed on June 6, and Stein on June 7, 1950, these petitioners were not arraigned before the late Justice Aylesworth in Chappaqua until the evening of June 8, 1950. It is evident that nothing could have been added to the complete confessions of Cooper and Stein after they had been made on June 6 and 7.

This Court's attention is invited to People's Exhibit 62, page 2894, the photograph showing the arraignment of the three petitioners on June 8, 1950. Cooper and Wissner show great diligence in hiding their faces. Their arms are functioning well. Stein appears ashamed and remorseful. None appear to be subjects for medical or hospital care.

Cooper was 42 years of age at this time and had been previously convicted on four separate occasions including one for murder (100). Stein was 51 years of age and had been previously convicted on five separate occasions, including two robbery convictions (101). Wissner was 39 years of age and had previously been convicted on two separate occasions of attempted robbery and robbery (102). They were not unsophisticated youths but mature males familiar with criminal court procedure.

At the arraignment of Cooper, Stein and Wissner on June 8, 1950, they were in open court. Spectators were present. Not one of the three petitioners complained to the presiding Justice of any threats, violence or ill-treatment of any kind from the time of their arrest until the arraignment. They were not held incommunicado at this time but were scrupulously advised of their rights by the late presiding Justice (1269-1272, 1856-1857). The clerk of the court said all the defendants were well able to talk (1269).

Stein and Wissner were with the District Attorney at State Police Headquarters shortly before their arraignment, and all three defendants were with him when he arraigned them before the Magistrate. None of them complained to the District Attorney at those times.

(E) None of the three petitioners complained to Doctor Robert D. Vosburgh, attending physician at the Westchester County Jail, on the morning after their arraignment, that they had been threatened or subjected to violence of any kind.

It is only fair to emphasize at this time that the physical examinations of Cooper, Stein and Wissner by Doctor Vosburgh, the attending physician at the Westchester County Jail on June 9, 1950, the morning after their arraignment, was a routine examination given to every newly admitted prisoner according to regulations then in force at the Westchester County Jail (1242-1243). These physical examinations were not made in pursuance of any complaints by the three petitioners. Other prisoners who had been in the jail for some time were examined by Doctor Vosburgh on the same morning (Ex. 000, pp. 1758-3008).

Doctor Vosburgh testified that none of the defendants complained to him that they had been mistreated by the State Police. He further stated that if any such complaints had been made he would have recorded them (1243-1244, 1728). He also stated that the bruises found on Cooper could have been present for six days. Cooper had been in custody four days when examined. It was difficult for him to tell how long they were present (1246). The doctor did not know when or where the bruises were sustained. He said they could have been self-inflicted (1249).

The only evidence of injury to Stein, according to the report of Doctor Vosburgh's examination on June 9, 1950, was the bruise in the left bicep area (1741). The

doctor testified that this bruise could have been sustained by Stein prior to his arrest on June 6, 1950 (1745). The doctor did not know how this bruising of the left bicep was sustained by Stein and Stein never told the doctor how he sustained the bruise (1745).

(F) Stein's failure to complain to the County Judge upon his arraignment to plead to the original indictment.

John J. Duff, Esq., of counsel for the petitioner, Stein, testified on the trial that with the assistance of the District Attorney, he was permitted to visit Stein at the Westchester County Jail on the afternoon of June 9, 1950, the day after the arraignment of Stein in Chappaqua before Justice of the Peace Aylesworth (1839). He observed certain bruises on Stein at this time (1839) but admitted on cross-examination that he did not know when or where Stein sustained the bruises (1850).

Mr. Duff also testified that one week later, on June 16, 1950, he appeared with Stein before the Westchester County Judge when Stein entered a plea of not guilty to the original indictment and Duff also conferred with the court about withdrawal. Neither Stein nor Duff complained to the County Judge that Stein had been beaten or threatened (1848-1849).

Thomas J. Todarelli, Esq., of counsel for the petitioner, Cooper, also testified to a visit made by him to the Westchester County Jail on June 10, 1950, at which time he interviewed Cooper in the company of Daniel Reisner and Peter L. F. Sabbatino, Esqs., of counsel for Cooper. Mr. Todarelli found certain bruises on Cooper at this time (1260). He was also permitted to make a copy of the report of the medical examination of Cooper made by Doctor Vosburgh the day before (1264). Mr. Todarelli did not know when or where Cooper sustained the alleged bruises that he had described (1266).

It should be pointed out at this time that neither Mr. Sabbatino nor Mr. Reisner testified as to their observations of Cooper's physical condition on this occasion.

Although Deputy Warden Allen of the Westchester County Jail was called as a defense witness (1272-1857), no testimony was adduced that Cooper, Stein or Wissner complained to him at any time that they had been threatened or mistreated by the State Police or anyone else.

During the first night of incarceration of the petitioners in the Westchester County Jail prior to the routine physical examination made by the jail doctor, there were no guards outside the individual cells to watch or observe the petitioners and that there was only one guard covering the cell block wing (1867-1868). There was thus an opportunity from approximately midnight until the morning for the petitioners to inflict injuries upon themselves. This action by desperate men has received judicial recognition (*People v. Valletutti*, 297 N. Y. 226, 237).

No further testimony having been offered as to the exertion of threats or violence against Cooper and Stein, there was a complete failure of proof on the part of these petitioners that their confession had been "made under the influence of fear produced by threats" (Sec. 395, N. Y. Code Crim. Proc.).

Procedure on preliminary examination as to the voluntariness of the confessions.

In the Wissner brief at pages 8 and 9 there was a discussion of New York State procedure on confessions: I believe we should point out that it is now and was at the time of this trial a settled practice to limit the cross-examination of a defendant who testified on preliminary examination as to the voluntariness of the confession to the issues of voluntariness and credibility only. In *People v. Tice*, 131 N. Y. 651, it was stated that there is a right

of general cross-examination given to the People but departure from this rule began with *People v. Trybus*, 219 N. Y. 18, where the district attorney limited his cross-examination to the issue of voluntariness and the trial court instructed the jury that the prosecutor was so limited by law. The Court of Appeals in that case does say that there is a right of general cross-examination but limitation is within the wise discretion of the trial court. However, since that case cross-examination of a defendant who testifies on preliminary examination has been limited in practice to the issue of voluntariness and he is not subject to cross-examination on the merits of the charge against him. For instance, in *People v. Doran*, 246 N. Y. 409, one of the leading cases in this State on confessions, cross-examination of that defendant was limited strictly to the alleged violence (fols. 3466-3550, pp. 694-710 in Volume 2141 of Court of Appeals (N. Y.) cases). In the very recent case of *People v. Malinski*, 292 N. Y. 360, in this court, as *Malinski v. New York*, 324 U. S. 401, again the cross-examination was limited to the voluntariness of the confession (fols. 1664-1706, pp. 555-569 of the Record on Appeal as printed in Vol. 4226 of Court of Appeals (N. Y.) cases).

Under these circumstances, in accordance with well-accepted principles, the most that can be said for the petitioners is that issues of fact as to the voluntariness of Cooper's and Stein's confessions were presented. These were properly left to the jury under the doctrine of *People v. Doran*, 246 N. Y. 409, where the New York Court of Appeals set forth the correct procedure at 415-416:

"When the point in the trial was reached at which the prosecution sought to introduce the confession, the learned trial justice very fairly and in accordance with our procedure took testimony both for the prosecution and for the defense upon the question of whether or not the confession was voluntary or was the outcome of

fear and violence. Upon this question there was a dispute of fact. Doran, called as a witness in his own behalf at this stage of the prosecution, testified that he did not know what he was saying because of the beatings which he had received from the police officers. Numerous witnesses, hereafter referred to, contradicted him and showed that the confession was made both to the officers and to the assistant district attorney voluntarily, and after Doran had been confronted both by Harrington and by Damp, who had confessed.

"Here was an issue of fact. Who was to decide it? The jury. They heard all the testimony, and the court left it to them to say, after a very full and complete charge, whether or not the confession was voluntarily made, and instructed them that if they concluded that it was not voluntary, but had been obtained under the influence of fear produced by threats, they should throw it out of the case altogether, and disregard it. The judge told them that the People must prove and they must find it to be a voluntary confession before it could be received as evidence. This is not only according to the practice in this State in the trial of criminal cases, but is also the law. When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant." * * *

"It may be that a question of fact created by Doran's testimony arose as to the voluntary nature of the confession. The jury, under proper instructions, and not the court, were the ones to determine this question of fact. No fault can be found with

the very full and complete way in which the court instructed them upon this issue. In fact, no fault whatever is found with the judge's very able charge. For the judge himself to have determined this question of fact and to have excluded the confession altogether would have been going very far indeed toward usurping the functions of a jury, bordering almost upon arbitrary action."

In the *Doran* case the New York Court of Appeals followed and endorsed similar rulings in earlier cases including: *People v. Randazzio*, 194 N. Y. 147; *People v. Schermerhorn*, 203 N. Y. 57; *People v. Trybus*, 219 N. Y. 18; *People v. Nunziato*, 233 N. Y. 394. The same ruling was made by the majority of the Supreme Court Justices in *Lyons v. Oklahoma*, 322 U. S. 596 at 601, where the Court held:

"The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process. *Lisenba v. California*, 314 U. S. 219, 239-241; *Waney, United States*, 266 U. S. 1, 14. The question of how specific an instruction in a state court must be upon the involuntary character of a confession is, as a matter of procedure or practice, solely for the courts of the state. When the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process, under the Fourteenth Amendment, are satisfied and this Court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness. The instruction given satisfies the legal requirements of the State of Oklahoma as to the particularity with which issues must be presented to its juries, *Lyons v. State*, 138 P. 2d 142, 164, and in view of the

scope of that instruction, it was sufficient to preclude any claim of violation of the Fourteenth Amendment."

This Court affirmed the murder conviction of Lyons.

(G) Cases cited by the petitioners where convictions were reversed because of extorted confessions are not in point because in those cases the defendants testified as to threats or beatings and were corroborated by other evidence.

Watts v. Indiana, 338 U. S. 49;

Turner v. Pennsylvania, 338 U. S. 62;

Harris v. South Carolina, 338 U. S. 68.

These cases were all decided by a divided court, the *Turner* and *Harris* cases turning upon a 5 to 4 vote by the Justices of the Supreme Court. A reading of the opinions of the State courts in these cases discloses that in all of these cases the defendants took the witness stand and testified as to the alleged brutality inflicted upon them in order to obtain the purported confessions. These defendants raised a question of fact for the trial court by their testimony.

In the *Watts* case, the defendant testified that he had been beaten, starved, threatened and abused. Cf. *Watts v. State*, 82 N. E. (2d) 846, at 848-849.

At the trial in the *Turner* case, the defendant denied the truth of the confession and asserted that it had been procured from him by fear and physical abuse. Cf. *Commonwealth v. Turner*, 358 Penna. 350; 58 Atl. (2d) 61, at 63.

During the trial in the *Harris* case, the defendant testified as to being struck by two police officers while detained and before the alleged confession was obtained. Harris

also swore that during his questioning "one large officer" had a blackjack shaking it at him and that one of the officers also threatened the appellant with a beating with a rope and rubber hose if he did not confess the killing. *Cf. State v. Harris*, 212 S. C., 124, 46 S. E. (2d) 682 at 684.

Although the Supreme Court reversed the convictions in these cases, with four of the nine Justices dissenting in two cases, it is evident that the appellants at least presented testimony based on alleged eyewitness knowledge as to the alleged beatings of the appellants. No such evidence is available to the petitioners in the instant cases, all three petitioners having refused to testify in their own behalf.

In *Stroble v. California*, 343 U. S. 5, decided April 7, 1952, Vol. 96, Law Ed. 529 at 540; Mr. Justice Clark, writing for the majority of the Justices of the Supreme Court, affirming the judgment of the California Supreme Court which affirmed the petitioner's conviction of murder in the first degree, summed up the law applicable to the technique of counsel for the three petitioners in the case at bar in substituting surmise, speculation and legalistic argument for competent evidence when they attempt to allege that the confessions of Cooper and Stein had been coerced:

"If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

The judgment of the Supreme Court of California was affirmed.

In *Ashcraft v. Tennessee*, 322 U. S. 143, cited by petitioners, Ashcraft testified in his own behalf as to the alleged coercion exercised upon him by the police including

continuous questioning of him by the police in relays for thirty-six hours.

The petitioners in the instant applications attempt to transplant the facts of *Ashcraft v. Tennessee* to their own cases. There is no proof in this record that either Cooper, Stein or Wissner were questioned in relays. On the contrary, Cooper was allowed to sleep on a mattress and Stein was allowed to sleep on the morning and night of the day of his arrest, and on the following morning he confessed on his own motion. Both were given the same meals that the police received. Wissner was arraigned on the evening of the day after his arrest and never confessed his guilt. Wissner was also given a place to sleep (2028).

In *Malinski v. New York*, 324 U. S. 401, reversing *People v. Malinski*, 292 N. Y. 360, 55 N. E. (2d) 353, Malinski took the stand in his own behalf on the trial and testified as to alleged violence exerted against him by two police officers. Moreover, this Court gave great consideration to the improper summation of the prosecution in reversing the judgment of death (Cf. opinion of Mr. Justice Douglas at pp. 405 to 407 including footnotes).

The County Judge of Westchester County, who presided at the jury trial in the cases at bar, had the *Malinski* case well in mind during the early stages of the trial of the three petitioners as appears from his comment to counsel for petitioner, Cooper, in the absence of the jury (1275). At page 1280 of the record the following declarations were made by the Trial Judge:

“The Court: The People of the State of New York v. Malinski—have you read that?

Mr. Sabbatino: I have it.

The Court: I have it before me. That went to the Supreme Court of the United States, and that subscribes to the rule as to arraignment very clearly,

and it has been approved by the highest court of this State and by the Supreme Court of the United States, and which I propose to charge in this case. The rule is very clear and I will state it to the jury at the proper time."

The argument of the prosecutor on this point also appears at pages 1280 and 1281.

In *Lisenba v. California*, 314 U. S. 219, the defendant testified on the trial that the police officers beat him; that his body was made black and blue; that the beating impaired his hearing and caused a hernia. The defendant had confessed the murder of his wife.

This testimony was contradicted by numerous witnesses for the State, as in the instant cases. It was admitted that the defendant was repeatedly and persistently questioned from Sunday night until Tuesday morning. No such proof exists in the cases at bar.

In spite of the prolonged questioning of Lisenba and his testimony as to the beatings administered to him, this Court affirmed the conviction.

The majority of the Court held (238-239):

"Here, judge and jury passed on the question whether the petitioner's confessions were freely and voluntarily made, and the tests applied in answering that question rendered the decision one that also answered the question whether the use of the confessions involved a denial of due process; this notwithstanding the issue submitted was not *ex nomine* one concerning due process. Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty, then, is to determine whether the evidence requires that we set aside the finding of two courts and a jury, and adjudge the admission of

the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty, as to amount to a taking of life without due process of law.

"In view of the conflicting testimony, we are unable to say that the finding below was erroneous so far as concerns the petitioner's claims of physical violence, threats, or implied promises of leniency."

In *People v. Crum*, 272 N. Y. 348, the New York Court of Appeals emphasized that the seven Judges of this court in a capital case are obliged to weigh the evidence and form a conclusion as to the facts.

Chief Judge Crane, at 272 N. Y., pages 349 and 350, said:

"The Constitution of this State in Article VI, Section 7, provides that the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. 'This', said the court in *People v. Gaffey* (182 N. Y. 257, 259), 'enables us to review the facts in capital cases as we always did'. A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt."

This doctrine was followed by the New York Court of Appeals in *People v. Valletutti*, 297 N. Y. 226 at 231, decided March 11, 1948. The seven Judges of the New York Court of Appeals certainly followed the same pro-

cedure in the three cases at bar and unanimously affirmed the convictions of the three petitioners.

United States v. Carignan (decided November 13, 1951), 342 U. S. 36, 96 Law Ed. Vol. 96, page 57, cited by petitioners, Cooper and Stein, is not applicable. The defendant was convicted of first degree murder in the United States District Court for the Territory of Alaska. The United States Court of Appeals for the Ninth Circuit reversed the conviction (185 Fed. (2d) 954). The sole ground of reversal was the admission of a confession obtained in a manner held contrary to the principles expounded in *McNabb v. United States*, 318 U. S. 332, and *Upshaw v. United States*, 335 U. S. 410.

The Supreme Court sustained the reversal of the conviction because the Trial Judge refused to permit the defendant to testify that the confession was involuntary, but held that the surrounding facts did not necessarily establish coercion, physical or psychological, so as to render the confession inadmissible.

Most important, the Supreme Court, with no dissents, held that "so long as no coercive methods by threats or inducements to confess are employed, constitutional requirements do not forbid police examination in private of those in lawful custody or the use as evidence of information voluntarily given".

It must be noted that criminal prosecutions in the Federal Courts proceed under rules enunciated by the Supreme Court, whereas criminal prosecutions in the State Courts, are not subject to such rules. As Mr. Justice Reed, writing for the majority in *Gallegos v. Nebraska*, 342 U. S. 55, said:

"The decision and judgment below determine for us that under the law of Nebraska such detention and examination, without appearance or arraignment, do

not require exclusion of the confessions or plea as involuntary. The rule of the *McNabb* case considered recently in *United States v. Carignan*, No. 5, October Term, 1951 (U. S. , , *ante*, 57, 72 S. Ct. ,), is not a limitation imposed by the Due Process Clause. *McNabb v. United States*, 318 U. S. 332, 340, 87 L. ed. 819, 823, 63 S. Ct. 608; *Lyons v. Oklahoma*, 322 U. S. 596, 597, note 2, 88 L. ed. 1481, 1483, 64 S. Ct. 1208. Compliance with the *McNabb* rule is required in federal courts by this Court through its power of supervision over the procedure and practices of federal courts in the trial of criminal cases. The power over state criminal trials is not vested in this Court. A confession can be declared inadmissible in a state criminal trial by this Court only when the circumstances under which it is received violate those 'fundamental principles of liberty and justice' protected by the Fourteenth Amendment against infraction by any state."

In *Gallegos v. Nebraska*, 342 U. S. 55, Law. Ed. Vol. 96, page 82, decided November 26, 1951, cited in the Cooper and Stein briefs, the defendant testified that he had been mistreated and threatened with violence while detained in Texas before he was returned to Nebraska to face a manslaughter charge. Gallegos confessed his guilt while so detained in Texas. The defendant had been detained for twenty-five days before being arraigned before a magistrate and could neither write nor speak English. Gallegos had been detained in Texas for eight days during which time no charge was filed against him nor was he arraigned before a magistrate and was then detained in Nebraska for fourteen additional days before arraignment.

The Supreme Court affirmed the conviction despite the testimony of the defendant that he had been threatened and mistreated before his confession.

Mr. Justice Reed, writing for the majority, said:

"A criminal prosecution approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect federal constitutional rights.

"While our conclusion on due process does not necessarily follow the ultimate determinations of judges or juries as to the voluntary character of a defendant's statements prior to trial, the better opportunity afforded those state agencies to appraise the weight of the evidence, because the witnesses gave it personally before them, leads us to accept their judgment insofar as facts upon which conclusions must be reached are in dispute. The state's ultimate conclusion on guilt is examined from the due process standpoint in the light of facts undisputed by the state. That means not only admitted facts but also those that can be classified from the record as without substantial challenge."

No facts are asserted in the briefs of Cooper, Stein or Wissner which establish any threats or violence on the part of the police.

The rulings of this Court in *Lisenba v. California*, 314 U. S. 219, and in *Gallegos v. Nebraska*, 342 U. S. 55, are applicable to the facts in the cases at bar because in both cases the defendants testified before the jury as to beatings by police thus raising issues of fact decided by the Jury, and the State Appellate Courts, and not disturbed by this Court.

(H) The instructions of the trial Judge to the jury in connection with the Cooper and Stein confessions and their legal effect on Wissner.

At pages 2765, 2766 and 2767 of the Record, the trial Judge carefully instructed the jury concerning the questions whether the confessions of Cooper and Stein were

given freely and voluntarily;

"Ladies and gentlemen, there have been received in evidence statements alleged to have been made by the defendant Calman Cooper and the defendant Harry, A. Stein. It is the contention of the People that these statements are in the nature of confessions and that they were made freely and voluntarily. On the other hand, it is the contention made on behalf of the defendant Calman Cooper and on behalf of the defendant Harry A. Stein that these alleged confessions are valueless as evidence against either of them, because it is contended on behalf of each of these defendants that these statements were made because of force and intimidation and fear visited upon each of them by certain members of the state police and implied coercion because of the manner in which they were kept in custody from the time of apprehension until the alleged confessions were made. You must find beyond a reasonable doubt that these confessions, or either of them, was a voluntary one before you would have a right to consider either of them.

"I charge you that the law of this State with respect to a confession is this, that a confession made by a defendant, whether in the course of a judicial proceeding or to a private person, can be given in evidence against him unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor. By itself, a confession is not sufficient to warrant a conviction without additional proof that the crime charged has been committed."

And so I charge you, ladies and gentlemen, that if you find from the evidence in this case that any of these statements, or either of them, made by the respective defendants, Mr. Cooper and Mr. Stein,

were not freely and voluntarily made, or if you have a reasonable doubt, it is your absolute duty to disregard the entire statement."

The Trial Judge also properly instructed the jury concerning the delay in arraignment of the petitioners (2767-2768):

"I charge you further that it was the duty of the police to arraign the defendants before the nearest Magistrate without unnecessary delay.

"I will read to you Section 165 of the Code of Criminal Procedure, which provides as follows:

That the defendant must in all cases be taken before the Magistrate without unnecessary delay.

"If you find that the arraignment of the defendants was delayed, you may consider that on the question of the voluntariness of any confession or statement, made by the defendant, Calman Cooper, and the defendant, Harry A. Stein. However, I am charging you that the failure to arraign, in and of itself, is not conclusive against the People, and does not in and of itself, standing alone, destroy the validity of the confession. On the question of whether or not the defendant Harry A. Stein and the defendant Calman Cooper were coerced, you may consider whether or not either of them made any complaints at the time of the arraignment, either to the Magistrate when arraigned, or to the jail physician when examined.

"And I also charge you that evidence, as to arraignment, if true, is not, however, conclusive as against the defendants Harry Stein and Calman Cooper. I again charge you that you may consider, or this jury may consider it on the issue of whether or not the confessions were voluntarily made or were involuntarily made. If you find that any one or all of these confessions—and I have charged this before—were

involuntarily made, I charge you you must disregard them in their entirety."

In fact, at page 2777, the Trial Judge instructed the jury that the delay in arraignment of all of the petitioners was unnecessary as a matter of law.

The Trial Judge also carefully protected the rights of the non-confessing petitioner, Wissner, as well as those of the petitioners, Cooper and Stein, when he impressively admonished the jury at pages 2769 and 2770 that statements made by one defendant are binding solely upon that defendant and no one else:

"And I say to you that it is the law of this state that in determining the question of guilt of the defendants or any one of them, you are not to consider a statement by one defendant as any evidence against the other defendant. I say to you that the alleged statement made by the defendant Calman Cooper cannot be considered by you as evidence against the defendant Nathan Wissner or Harry Stein, and I say to you further and charge you that the alleged statement made by the defendant Harry A. Stein cannot be considered by you as any evidence whatsoever against the defendant Calman Cooper or against the defendant Nathan Wissner. Such statements are to be given such weight as you consider proper, if you consider them voluntarily made, but only as against the defendant who made them."

At other times during the trial, prior to his final charge to the jury, the learned trial Judge repeatedly gave the same admonition to the jury:

"Mr. Segal: May I ask your Honor at this time to remind the jury that whatever Stein may have said at that time, if he said anything, must not be held against my client Wissner?"

The Court: I charge the jury at this time that any statement or alleged statement made by Stein, if believed, is binding only as against him. It is not in evidence as against the other two defendants at this trial, and you must not consider it as evidence as to the other two defendants.

Will you follow that instruction, ladies and gentlemen?"

At page 1456:

"The Court: I will now instruct the jury: I say, ladies and gentlemen, as to the defendant Calman Cooper, if this statement be in the nature of a confession as to what occurred on the afternoon of April 3rd, 1950, it is only binding as against Calman Cooper; it is not in any wise binding upon the other two defendants in this trial, and that is the law of this State and you must accept it. It is not evidence as against Mr. Stein, if his name should be mentioned, and not evidence as against Nathan Wissner if his name is mentioned; it is only binding as against —if believable—it is only binding as against the defendant Calman Cooper."

At page 1994:

"Mr. Sabbatino: As to Cooper, I ask at this time that your Honor instruct the jury that this alleged statement by Stein is admissible, or should be considered by the jury only as to him, if they come to the conclusion that the statement is a voluntary statement, not induced by fear, and that as to Cooper it has no evidentiary value whatsoever."

The Court: Mr. Foreman and ladies and gentlemen of the jury, I now instruct you in regard to this statement or alleged statement: If you find that it was of a voluntary character, and if you find it credi-

ble, the testimony of this witness, then you may consider it only as binding upon the defendant Harry A. Stein; it does not constitute any evidence whatsoever; it has no probative value whatsoever as against the defendant Nathan Wissner or the defendant Calman Cooper. That is the law of this case."

At pages 1942-1943:

"Mr. John O'Brien: May I ask your Honor to instruct the jury that nothing that Stein says in his confession is binding on Cooper?"

The Court: I will charge the jury as to the effect of any alleged or proposed statement made by Mr. Stein; it is only binding as against Mr. Stein, and Mr. Stein alone, if voluntary, and if believed; it does not constitute evidence against the other two defendants, if their names happen to be mentioned therein. That is the law of this case; and I shall further instruct the jury as to that law at the close of the case."

At page 1967:

"The Court: I will allow the statement into evidence, subject to the deletions which were made in chambers, with all counsel present, and I will say again to the jury and charge them, that the law of this case is that if the statement is of a voluntary character, which will be submitted to you as a question of fact, it is only binding as against the defendant Harry Stein and does not constitute any evidence whatsoever as against the defendant Nathan Wissner or the defendant Calman Cooper. That is the law of this case and you will abide by the law, as you are bound to do so under your oaths. I will allow it into evidence; subject to the deletions already made."

At page 2245:

"Q. At that time did you have a talk with Wissner?

A. Yes.

Q. Can you tell us what you said to him and what he said to you? A. Yes, I said to him that both Cooper and Stein—

"Mr. O'Brien: I object to anything about what he said about the defendant Stein, on the ground that it is incompetent and not binding on the defendant Stein.

The Court: It is not binding on Mr. Stein, that is true—whatever Mr. Wissner said; it is only binding, if it constitutes admission voluntarily made, upon the defendant Wissner."

It is difficult, indeed, to conceive of any further efforts that could have been exerted by the Trial Judge to protect the rights of all of the petitioners in connection with the confessions of Cooper and Stein and the delay in arraignment of the petitioners.

**Question of possible deletion of Wissner's name
from confessions.**

The claim made in Wissner's brief that the name of the non-confessing defendant should be stricken from the confession read into evidence ignores the fact that there are two issues to be decided by a jury before the contents of a confession are to be used in evidence against the confessing defendant. The confession must not only be freely and voluntarily made but a jury is to accept only that portion that it finds to be true in fact (p. 2767). The jury must decide as an issue of fact from the evidence in the case outside the confessions, whether what he says therein is true and this issue cannot be decided as it effects the con-

fessing defendant's cooperation with others in the commission of a crime unless the names of those persons are left intact within the confession. Cooper and Stein were here accused of participation in a felony murder in which the shooting was done by defendant Nathan Wissner who was a fellow conspirator in planning and executing the underlying felony of Robbery. Their confession to be relevant evidence must connect them with the underlying felony and the co-conspirator who did the actual shooting. A substitution of some letter of the alphabet makes it impossible for a jury to make any factual findings where several persons are involved in planning and executing the crime.

It is worthy of note that although letters of the alphabet were substituted for names in the confession of Malinski, the trial Court in that case pointed out a confessing defendant is only entitled to an instruction to the jury to disregard any reference to the other defendants (p. 543, fol. 1629 of Malinski record) (292 N. Y. 360).

Professor Wigmore (Cf., *Wigmore on Evidence*, Third Edition, Vol. VII, Sec. 2100 (d), p. 496) sets forth the well-accepted practice in the United States of admitting in evidence confessions of defendants in which non-confessing defendants are named:

“(d) Since Confessions are not admissible against third persons (*ante*; §§ 1076, 1079), the *names of other co-indictees*, mentioned in a confession used and read against the party making it, were by most English judges ordered to be omitted. But by other judges the names were ordered read and the jury instructed not to use the confession against them. In Canada and the United States the latter practice is favored.”

United States v. Ball, 163 U. S. 662; *Johnson v. United States*, 82 Fed. (2d) 501, and *People v. Fisher*, 249 N. Y.

419, 164 N. E. 336, are cited by Professor Wigmore. In the *Fisher* case three defendants were tried jointly. One of them never admitted his guilt. The trial Court denied motions for separate trials and the confessions of the two confessing defendants were received in evidence under proper instructions that they were not binding on the non-confessing defendant.

People v. Doran, 246 N. Y. 409, also stands for the same proposition. Here the confession of the co-defendant, Harrington, was read to the jury although it contained frequent references to Doran's participation in the murder (Cf., Record on Appeal to New York Court of Appeals, fols. 5755-5912). The conviction of Doran was affirmed.

See also:

Comm. v. Millen, 289 Mass. 441, 194 N. E. 463;
Comm. v. Terengo, 234 Mass. 56, 124 N. E. 889;
Pea. v. Roxborough, 307 Mich. 575, 12 N. W. (2d) 466; cert. denied, 323 U. S. 749;
State v. Newman, 95 N. J. L. 280, 113 Atl. 225;
State v. Fox, 133 Ohio St. 154, 12 N. E. (2d) 413;
State v. Grossman, 189 Wash. 124, 63 Pac. (2d) 934.

This disposes of the contentions of the non-confessing petitioner, Wissner, in the cases at bar.

Wissner claims unfairness by the District Attorney in reading a particular portion of the confessions during his summation. This argument claims that the District Attorney's explanation to the jury that this was done to answer an argument of Wissner's counsel that "Dorfman was not the driver in the confession" (2697) was merely a pretext. The District Attorney had every right to answer the chal-

lenger made by Wissner's counsel that Dorfman's role of the driver was fabricated by him in August and was not in the confession (2573-2574). While the reading of portions of the confession by the District Attorney is now criticized, Wissner's counsel then invited the jury to scrutinize them (2574).

To argue that a jury, under the proper instructions of the Court, existing in this case, were unable to make the simple decision that the confessions of Stein and Cooper could not be used against Wissner in deciding his guilt or innocence, is to denounce the jury system. Under this fallacious theory of Wissner, a jury could never fairly sit in a criminal case involving a joint trial of two or more defendants where at least one of the defendants had confessed his guilt. Such a specious argument answers itself.

Conclusion.

We respectfully submit:

(1) That all of the petitioners were accorded a fair trial in accordance with the due process clause of the Fourteenth Amendment and in accordance with the mandate of the New York Penal Law, the New York Code of Criminal Procedure, the decisions of the New York Court of Appeals and of the Supreme Court of the United States;

(2) That the confessions of Cooper and Stein were freely and voluntarily made, and that those issues were properly submitted to the Jury under well-accepted legal instructions of the trial Judge;

(3) Wissner has no standing on this application. Reference to him in the Cooper and Stein confessions

were binding only upon the confessors and not upon Wissner. The trial Judge so instructed the jury under approved New York law.

The Convictions of the Three Petitioners Should Be Affirmed.

Dated: White Plains, New York,
December 12, 1952.

Respectfully submitted,

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Appendix A.

UNITED STATES CONSTITUTION, AMENDMENT XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appendix B.

Section 1044, Subdivision 2, of the Penal Law of the State of New York:

“§1044. Murder in first degree defined.

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise.”

of these officers was examined by counsel for any of the petitioners concerning threats or violence exerted against petitioners, Cooper, Stein or Wissner, while in custody.)

June 6—10 A.M.
to 11 A.M.

Captain Glasheen first saw Stein in the dressing and locker room at State Police Headquarters (1904). Corporal Brann was guarding Stein at this time (1905). Captain Glasheen did not observe anything out of the way with Stein and then conversed with him (1905). This conversation lasted for an hour (1906; 1924). Stein was seated and standing at different times during this conversation and made no complaints to Captain Glasheen (1906). Captain Glasheen instructed the officer assigned to guard Stein to obtain lunch for Stein (1907).

June 6—1:15-1:30
P.M. to 4:15-
4:30 P.M.

Captain Glasheen again visited Stein in the dressing and locker room and conversed with Stein for about three hours (1906-1907; 1925). Captain Glasheen alone talked to Stein, with Sergeant Johnson coming in later during this period (1907).

June 6—7 P.M.

Captain Glasheen questioned Stein on and off for several hours and parted company with Stein at 2:15 or 2:30 A. M. on the morning of June 7 (1908; 1926). It was at this time that Captain Glasheen read two answers from the Petitioner, Cooper's, confession to Stein and told Stein to "sleep on it" (1954). Stein never complained to Captain Glasheen (1913).

While other officers were present (1908), it does not appear that anyone but Captain Glasheen questioned Stein.

June 7—9-10 A.M.

Captain Glasheen received a message from Stein and visited Stein at the dressing room at this time (1908; 1929). Stein told Captain Glasheen that he wished to make a full statement. Stein then made an oral statement (1909). Stein was seated in a leather arm-chair at this time (1909). Telephone booths, cigarette vending machines, ash trays and leather lounge chairs are located in this dressing room (1692-1693). Stein, at this time, told Captain Glasheen of his participation in the crime (1930). Stein told Captain Glasheen that he had slept (1935).

June 7—1 P.M.

Captain Glasheen met Stein and they walked together across the court yard at State Police Headquarters to the Bureau of Identification Room (1910).

June 7—1:15 P.M.

Taking of formal typewritten confession of Stein commenced (1911). Mrs. Anna Klaus, civilian stenographer, took down questions and answers first on typewriter and later in shorthand (1576-1579). Captain Glasheen did the questioning (1578).

June 7—4:30 P.M.

The taking of the Stein confession and the typewriting of it completed (1579; 1914; 1934). According to Mrs. Klaus, no threats, force or violence were used on Stein (1582).

June 7—5 P.M.

Stein signed this confession (Peo. Ex. 64, p. 2896) by 5 P. M. (1937), after having made corrections in his own handwriting.

1950

June 8—1 P.M.
to 5 P.M.

Stein visited the premises of The Readers Digest Association with Captain Glasheen and Trooper Crowley and explained how the crime had been committed (1695-1696; 1992-1993).

June 8—10 P.M.

Stein and the other petitioners were arraigned before Justice of the Peace Aylesworth at Chappaqua, Westchester County (2017; 2047). (Cf., Photograph of arraignment; Peo. Ex. 62, p. 2894). Fifteen or twenty spectators were present at the arraignment besides police and petitioners (2043). All of the petitioners failed to complain to the Presiding Justice as to any threats or violence exerted against them (2042).

June 8—11:45 P.M.

Stein received at Westchester County Jail, Eastview, New York (1858).

Summary

Stein was in custody approximately thirty-one hours prior to the oral confession of guilt made by him at 10 A. M. on June 7, 1950. The number of hours of questioning of Stein on four separate occasions during this period total a maximum of twelve.

Stein was in custody approximately thirty-eight hours when he signed the formal typewritten confession (Peo. Ex. 64, p. 2896), at 5 P. M. on June 7, 1950. The questions propounded to Stein and his answers took up approximately three hours on this occasion making a total maximum questioning period of fifteen hours from the time of his arrest until he signed the formal confession and made the corrections that he desired.

Captain Glasheen was present with Stein during all of this time and testified that at no time did anyone beat or mistreat Stein (1931).

Sergeant Johnson of the State Police telephoned a New York City hospital twice at Stein's request in order to inquire about the illness of Stein's mother (2038).

II

Answering arguments in petitioners' reply brief.

The petitioners were permitted by the Chief Justice to file a reply brief within one week after the argument on December 18, 1952. One copy of this brief was received by the District Attorney on January 2, 1953, and contained new arguments and references to additional sources which the People believe must be answered. This portion of the supplemental brief covers those matters.

The New York State Police in the Cases at Bar Had the Power to Arrest the Petitioners Without Warrants Under New York Law.

At the bottom of page 13 of the petitioners' reply brief, received by the District Attorney on January 2, 1953, the incredible statement is made that the New York State Police "have no power to arrest without warrant in a case such as at bar".

This remark displays an abysmal lack of knowledge of the applicable sections of the Code of Criminal Procedure of the State of New York.

In the People's main brief, at page 24, reference is made to Section 223 of the Executive Law of New York (Book 18, McKinney's Consolidated Laws of New York, Annotated.) Section 223 of the New York Executive Law, quoted in full at page 64 of the People's main brief, grants

to the State Police the power, "to prevent and detect crime and apprehend criminals." * * * "They shall have power * * * to exercise all other powers of peace officers of the State of New York."

The definition of arrest and the powers of arrest of peace officers in the State of New York are defined by Sections 167, 168, 170, 177 and 179 of the New York Code of Criminal procedure which read as follows:

"§ 167. *Arrest, defined.* Arrest is the taking of a person into custody that he may be held to answer for a crime."

"§ 168. *By whom an arrest may be made.*

An arrest may be,

1. By a peace officer, under warrant;
2. By a peace officer, without a warrant; or
3. By a private person."

"§ 170. *When the arrest may be made.* If the crime charged be a felony, the arrest may be made on any day, and at any time of the day or during any night. If it be a misdemeanor, the arrest cannot be made on Sunday, or at night, unless by direction of the magistrate indorsed upon the warrant."

"Ch. IV—ARREST BY AN OFFICER, WITHOUT A WARRANT.

§ 177. *In what cases allowed.* A peace officer may, without a warrant, arrest a person,

1. For a crime, committed or attempted in his presence;
2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it."

"§ 179. *May arrest at night, on reasonable suspicion of felony.* He may also at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that a felony had been committed, but that the person arrested did not commit it."

Of course, felonies had been committed in Westchester County which the State Police, *as Peace Officers*, were investigating, including the armed robbery of the ~~money~~ truck of The Reader's Digest Association and the brutal murder of Andrew Petrini. The State Police had reasonable cause to believe that Petitioner, Cooper, had participated in these crimes because the witness, Jeppeson, (223) had told the State Police that he had rented the truck used in committing these crimes to petitioner, Cooper. The other civilian witness, Percy Brassett, (2053) had also been available to the State Police and had advised them of his prison conversations with Cooper concerning the moneys carried by The Reader's Digest money truck. The petitioner, Stein, had visited the automobile rental agency operated by the petitioner, ~~Wissner~~, and the accomplice, Dorfman, who testified against his confederates, and the confession of the petitioner, Cooper (Peo. Ex. 59, 2875) implicated the petitioner, Wissner, prior to Wissner's arrest on June 7, 1950.

It is evident that under the quoted sections of the New York Code of Criminal Procedure that the New York State Police had the power to arrest all of the petitioners without a warrant. Reckless and irresponsible statements to the contrary in the petitioners' reply brief should alert

the Justices of the Court to a careful scanning of all other gratuitous statements in the petitioners' reply brief having no basis in law or in fact.

In our main brief (pp. 39 and 40) and on the oral argument, the people contended that it is now the settled practice in New York State for the trial court to limit cross-examination of a defendant who takes the stand on the issue of voluntariness to that issue alone, and always, of course, conceding that any evidence relevant to his credibility as a witness would also be permitted. It was not the people's intention to create an impression that this was a voluntary act on the part of individual District Attorneys, and so we repeat again that it is the trial courts of New York which do not permit general cross-examination. The petitioners' reply brief has cited the records on appeal at pages six and seven, and the people respectfully submit that our reading of the records cited does not change in any way the contentions made upon the argument of this case.

In *People v. Valetutti*, 297 N. Y. 226, the defendant was subjected to the heavy attack on his credibility which his criminal record warranted but there was no general cross-examination. At page 132, folio 395, there is a question which appears to involve the crime charged, but comparison with the indictment at page 3, folio 9, shows that this is a question directed to another criminal act as affecting defendant's credibility, and the people were bound by the negative answer of the defendant.

In *People v. Mummiani*, 258 N. Y. 394, the defendant himself had mentioned on his direct examination his presence at the scene (p. 59). The court did not rule that general cross-examination was permissible but allowed certain questions as to the contents of the confession on the District Attorney's theory that this line of questioning was to rebut defendant's claim that the factual details were

all suggested to him by the police (see p. 76, folio 226; pp. 87 to 94, folios 259 to 281; and pp. 278 to 284, folios 832 to 852 of the summation).

In *People v. Borowsky*, 258 N. Y. 371, the defendant had made a general denial of guilt at the close of his direct examination (p. 328 of the Court of Appeals record on appeal).

If the petitioners' argument on the so-called dilemmatic choice of a defendant who has a previous criminal record were extended to its logical conclusion, then no party to any law suit would be subjected to the test of his credibility as a witness before the triers of the facts. The petitioners quite naturally find no authority for such an extension of the application of "due process".

In fact, the petitioners would have the Justices of this Court believe that the petitioners' credibility should not be tested by the people in the event that petitioners testified concerning alleged police brutality. Of course, none of the petitioners did testify; however if they had, petitioners now urge that their credibility should not be attacked and their prior criminal records should not be revealed. No authorities are quoted in support of this naive proposition.

On the contrary, it is the well settled practice throughout the Federal Courts that a defendant is to be treated like any other witness. In the case of *United States v. Gross, et al.*, 7th C. C. A., 103 Fed. 2nd 11, a defendant, Nolan, confessed, testified on his own behalf that "his confession was induced by a promise of reward and hope of immunity", and was subjected to cross-examination as a witness. The Court there said at 103 Fed. 2nd 13: "It must be remembered that when a party or a witness takes the stand he takes his character with him, and he may be questioned as to collateral matters insofar as the answers thereto may reflect upon his character as a witness."

In his character as a witness, credibility of the defendant is important and this Court has stated that there is no duty on a trial court to prevent a witness from being discredited on cross-examination (*Alford v. United States*, 282 U. S. 687, 694).

There is a full discussion of the rights of a defendant with an acknowledgment that differences may arise in the various states in an opinion by Circuit Judge Dobie of the Circuit Court of Appeals, 4th Circuit, in *Simon v. United States*, 123 Fed. 2nd 80, at page 85, (writ of certiorari denied, 62 S. Ct. 412), as follows:

"It is argued that because the defendant was on trial he was not subject to impeachment by cross-examination as to other offences like an ordinary witness. It is well settled, however, that where a defendant elects to make himself a witness he may be cross-examined as such (Citing cases). In the case last cited the rule is well stated by the late Judge McDermott as follows: 'If the defendant takes the witness stand, a different rule comes into play. He steps out of his character as a defendant, for the moment, and takes on the role of a witness, and as such becomes subject to cross-examination in the same manner and to the same extent as any other witness.' * * * In criminal cases, there may therefore be differences arising from variations in the common law in the different jurisdictions at the time of their admission into the Union. It may however be said that, subject to possible variants so arising, it is well settled in criminal cases in the federal courts that cross-examination must be confined to the subjects of the direct examination (citing cases); that the credibility of a defendant who has testified may be impeached in the same manner and to the same extent as any other witness, and no further (citing cases); questions asked

on cross-examination for the purposes of impeachment should be confined to acts or conduct which reflect upon his integrity or truthfulness, or so "pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth" (citing cases); when such a question is asked and answered, the inquiry is ended; the government is bound by the answer in that it may not, on rebuttal, offer countervailing proof (citing cases). To this latter rule, there is one exception: In criminal cases a witness may be asked, for purposes of impeachment, whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude, and on rebuttal the record of such conviction is admissible. (Citing cases.) * * * *

No court has ever adopted the principle that defendants with a criminal record may use the existence of that record to avoid testifying before a jury, but that a defendant with an unblemished record must testify and take his chances.

This argument also ignores the judicial review, as in the New York cases cited, of the testimony of such a defendant as a part of the entire record, without any prejudice, and often to his benefit, despite the criminal record brought out on the trial.

As to the Charge of the Trial Judge:

Respondents again state, as they did on the oral argument, that the charge of the Court was limited on the voluntariness of the confession to the New York statutory test (pp. 8 to 11). This argument ignores the portion of the charge quoted in the People's brief at page 52, and the

other portions read to this Court on the argument from page 2768 of the record, which reads as follows:

"And, ladies and gentlemen, I charge you further that the police are not on trial in this case; that this testimony was adduced solely upon the question as to whether or not the alleged confessions, which were made or alleged to have been made, were the result of coercion, whether direct or implied, which is prohibited by the statute and which invalidates a confession if made."

All of page 52 in the People's main brief, and the following paragraph charged the jury to consider the delay in arraignment, and coercion, and was in addition to the statute provisions of "fear produced by threats".

The Court further charged the delay in arraignment was unnecessary as a matter of law (p. 2777).

None of defendants' trial counsel excepted to the charge on this point nor made any request for any additional language (pp. 2778 to 2787).

The petitioners now say there has never been a determination of voluntariness of the confessions (p. 42). They are well aware that before the Court of Appeals of New York had heard the instant case, they had ruled that a coerced confession would void the conviction regardless of other evidence of guilt (see *People v. Leyra*, 302 N. Y. 353, 364). The affirmance is a finding that the confession was not involuntary. Moreover, in amending the remittitur in the cases at bar, the New York Court of Appeals clearly stated that it had necessarily passed upon the issue of whether the admission in evidence of the petitioners' confessions was in violation of "due process" (303 N. Y. 982). That finding was relied upon as a preliminary jurisdictional fact in the petitions for a writ of certiorari (Cooper's Petition, pp. 6 and 7).

**Further Misinformation in Petitioners'
Reply Brief:**

The petitioners in the reply brief state that the District Attorney and his assistants were at State Police Headquarters more than a day before the arraignment (p. 14). This is wholly incorrect as the District Attorney and his assistants arrived there between 4 and 6 P. M. on June 8, 1950, and all three petitioners were arraigned that evening about 10 P. M. The only testimony covering this is by a stenographer from the District Attorney's Office (2126, 2143, 2165) and does not otherwise appear in the record.

CONCLUSION

The convictions of the three petitioners should be affirmed.

Dated: White Plains, New York,
January 7, 1953.

Respectfully submitted,

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Appendix C.

Section 1045 of the Penal Law of the State of New York:

“§1045. Punishment for murder in first degree:

Murder in the first degree is punishable by death, unless the jury recommends life imprisonment as provided by section ten hundred forty-five-a. As amended L. 1937, c. 67, §1, eff. March 17, 1937.”

Appendix D.

Section 1045-a of the Penal Law of the State of New York:

“§1045-a. Life imprisonment for felony murder; jury may recommend:

A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life. Added L. 1937, c. 67, §2, eff. March 17, 1937.”

Appendix E.

Section 165 of the Code of Criminal Procedure of the State of New York:

“§165. Defendant, upon arrest, to be taken before magistrate.

The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night. As amended L. 1882, c. 360, §1; L. 1887, c. 694. Eff. 20 days after June 24, 1887.”

Appendix F.

Section 391 of the Code of Criminal Procedure of the State of New York.

“§391. Separate trial of defendants jointly indicted
defendant, jointly indicted, may be tried separately or jointly in the discretion of the court.
As amended L. 1926, c. 461. Eff. July 1, 1926.”

Appendix G.

Section 395 of the Code of Criminal Procedure of the State of New York.

“§395. Confession of defendant, when evidence, and its effect.

A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.”

Appendix H.

Section 223 of the Executive Law of the State of New York:

“§223. DUTIES AND POWERS OF THE SUPERINTENDENT OF STATE POLICE AND OF MEMBERS OF THE STATE POLICE.

“It shall be the duty of the superintendent of the state police and of members of the state police to prevent and detect crime and apprehend criminals. They shall also be subject to the call of the governor and are empowered to co-operate with any other department of the state or with local authorities. They shall have power to arrest, without a warrant, any person committing or attempting to commit within their presence or view a breach of the peace or other violation of law, to serve and execute warrants of arrest or search issued by proper authority and to exercise all other powers of peace officers of the State of New York. Any such warrants issued by any magistrate of the state may be executed by them in any part of the state according to the tenor thereof without indorsement. But they shall not exercise their powers within the limits of any city to suppress rioting and disorder except by direction of the governor or upon the request of the mayor of the city with the approval of the governor.”

Appendix I.

United States Code, Section 1257, subdivision 3:

“§1257. STATE COURTS; APPEAL; CERTIORARI.

“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

“(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

June 25, 1948, c. 646, 62 Stat. 929.”

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I.

**Chronological summary of detention of petitioners
Cooper and Stein prepared at the request of the Court.**

A.

**Chronology as to the Detention of
Petitioner, Cooper:**

1950

June 5th 9:15 A.M. Cooper arrested in New York City (1310), on signal from witness Jepeson identifying Cooper as man who had rented truck used in the hold-up (778, 788-789).*

* Numbers in parentheses refer to the pages in the certified Record on Appeal to the New York Court of Appeals.

1950

June 5—2 P.M.

Cooper arrives at State Police Headquarters, Hawthorne, Westchester County, New York (1311-1312). Fingerprints and pedigree taken (1391-1393).

June 5—3 P.M.
to 5 P.M.

Mrs. Anna Klaus, Civilian Stenographer, present with Cooper and three State Police officers (1573-1574). They did not question Cooper (1393).

June 5—5:30 P.M.

Cooper has supper (1388-1392).

June 5—8 P.M.
to 1 A.M.

Cooper questioned by Sergeants Barber and Sayers and Trooper Buon, State Police Officers (1312; 1395; 2101; 2073-2077). Not a hand was laid on Cooper during this time (2074; 2081). Sergeants Barber and Sayers and Trooper Buon all left Cooper at or before 1 A. M. on June 6 (2074; 2077; 2101).

June 5—12 P.M.

Captain Glasheen of State Police brings the civilian witness, Percy Brassett (2053) before Cooper. Brassett then identified Cooper (2002-2003). Captain Glasheen did not question Cooper at this time (2003).

June 6—1 A.M.

Cooper left in the custody of one trooper (2078).

June 6—1 A.M.
to 8 A.M.

Cooper sleeps or rests (1413).

(N.B.: This period of questioning has been put down according to the witness for the People who gave the latest time of the termination of this questioning, *i. e.*, witness Barber at page 2077. However, the other witnesses all stated that the questioning terminated around midnight. Hess said that he left and brought in the mattress just after midnight (1395-).

1950

1396), and Trooper Leon, who relieved him on guard duty at midnight, said that the mattress was brought in for Cooper a little after midnight (1421). Buon said the questioning ended at midnight (2101) and Sayers said that he stayed with Cooper until about 12:30 A. M. (1312).)

June 6—

Cooper received the same meals at breakfast, luncheon and dinner as the State Police (1389; 1393; 1413-1414).

June 6—10 A.M.
to 6 P.M.

Cooper questioned by same three State Police Officers (1403-1404; 2103). This questioning was interrupted for luncheon and dinner (1389). Sergeant Sayers left at noon (1313).

June 6—6 P.M.

Cooper initiates proposal to confess (2115-2116).

June 6—6:30 P.M.
to 7 P.M.

Cooper advises Sergeant Sayers he will confess if brother Morris Cooper can be released from Parole violation, and asks to see someone from the Parole Board (1313-1315).

June 6—8 P.M.

District Supervisor John Reardon of State Parole Commission comes to see Cooper as requested and discusses with Cooper necessity for action by a Parole Commissioner (1446-1449).

June 6—10 P.M.

Cooper makes oral admissions of guilt to New York State Parole Commissioner Donovan in the presence of District Supervisor Reardon of the Parole Commission (1450-1453, incl.). Cooper did not complain of any threats or violence to these officials (1454).

June 7—1:30 A.M.
to 2 A.M.

Typewriting of formal confession of Cooper completed (1461). Cf., People's Exhibit 59, page 2874.

Summary

The petitioner Cooper was in custody at State Police Headquarters for 32 hours prior to oral admissions of guilt to State Parole Commissioner Donovan. He was questioned for a maximum of 12 hours, allowing a half hour for each of two meals, on two separate occasions.

B.

Chronology as to the Detention of Petitioner, Stein:

1950

June 6—2 A.M.

Trooper Crowley of the New York State Police testified that at this time Petitioner, Harry A. Stein, was arrested at the home of his brother, Lou Stein, at 234 East 3rd Street, in the Borough of Manhattan, City of New York. He and Corporal Sweeney of the New York State Police took part in the arrest and also Detective Mulligan of the New York City Police Department (1685):

At this time, Detective Mulligan told petitioner, Harry A. Stein, in the presence of his brother, Lou Stein, that "you are wanted by the State Police in the Reader's Digest case". Lou Stein was not arrested (1959).

Crowley also testified that Mulligan told petitioner, Stein, where he was going (1696-1697) in the presence of his brother, Lou.

Detective Mulligan further testified (1960) that he told petitioner, Harry A. Stein, at this time: "You are wanted on the Reader's Digest case; these are state troopers". Harry

1950

Stein then said to his brother, Lou: "You get hold of John Duff and get ahold of somebody" (1960).

Detective Mulligan then told the petitioner, Stein, in the presence of his brother, Lou: "You are going to the State Police Barracks at Hawthorne, New York" (1960). It is significant that on June 7, 1950, John J. Duff, Esq., of counsel for petitioner, Stein, did commence legal proceedings for the release of Stein. Lou Stein had speedily communicated with John J. Duff, Esq., at 7:20 A. M. on June 6, some five hours after petitioner, Harry Stein, had been arrested (1828; 1832).

June 6—3-3:30 A.M. Petitioner, Harry A. Stein, arrived at the Hawthorne Headquarters of the New York State Police (1689), in the company of Troopers Crowley and Ford. Crowley went to bed in about 25 minutes and left Stein with Sergeant Kormandy (1691).

June 6—3 A.M. Captain Glasheen present at State Police Headquarters when Stein arrived (1910-1911; 1916).

June 6— After Stein's arrival at State Police Headquarters between 3 and 3:30 A. M. Corporal Brann and Trooper Pietrack were assigned by Captain Glasheen as alternating guards of Stein (1905; 1923).

(N.B.: Although Corporal Brann testified as a witness on the trial for the petitioner, Wissner (2372), and Trooper Pietrack testified as a witness for the People, and was cross-examined by counsel for the petitioner, Cooper (1098; 1101), neither

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PETITIONERS' APPLICATIONS FOR REHEARINGS**

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STATEMENT

All of the petitioners seek a review of the judgment and decision of this Court handed down on June 15, 1953, affirming the unanimous judgments of the Court of Appeals of New York rendered on March 6, 1952 (303 N. Y. 856, 104 N. E. 2d, 917) which affirmed the judgments of the County Court of Westchester County, New York, entered on December 27, 1950, convicting all of the petitioners of the crime of murder in the first degree and sentencing all of the petitioners to death.

On October 13, 1952, this Court granted writs of certiorari to the Court of Appeals of New York in these cases "*limited to the question as to the admissibility of the confessions.*" 344 U. S. 815; 97 L. Ed. (Advance, p. 32). (Emphasis supplied.)

The appeals of all of the petitioners were argued on December 18, 1952, and on June 15, 1953, the Chief Justice and Justices Reed, Jackson, Burton, Clark and Minton concurred in affirming the judgments of conviction as to all of the petitioners. (— U. S. —; 97 L. Ed. (Advance, p. 1007)).

AS TO THE PETITIONS OF STEIN AND COOPER

Mr. Justice Jackson writing for the majority, disposed of these petitioners' contentions, to the effect that their confessions admitting their participation in the felony murder of Andrew Petrini had been coerced. At page 19 of the majority opinion the Court held:

I. "We cannot say that petitioners have been denied a fair hearing of the coercion charge."

At page 26 as to alleged physical violence exerted upon petitioners, Stein and Cooper, the Court said:

II. "We determine that the state court could properly find that the confessions were not obtained by physical force or threats."

At pages 28 and 29, as to alleged psychological coercion exerted upon petitioners, Stein and Cooper, the majority held:

III. "Both confessions were 'voluntary', in the only sense in which confessions to the police by one under arrest and suspicion ever are. The state courts could properly find an absence of psychological coercion."

3
At page 30, after reviewing the question of illegal detention, the Court held:

IV. "From the foregoing considerations, we conclude that if the jury resolved that the confessions were admissible as a basis for conviction it was not constitutional error."

A perusal of the above extracts from the majority opinion in these cases should satisfy the most skeptical that this Court decided the sole question that it consented to hear, to wit, "the question as to the admissibility of the confessions." 344 U. S. 815. Of course, the petitioners are dissatisfied with the Court's ruling "that if the jury resolved that the confessions were admissible as a basis for conviction it was not constitutional error." This finding cuts the ground from under the contentions of the petitioners Stein and Cooper. Indeed, these petitioners urged no other bases for the reversal of their convictions in their petitions and briefs for writs of certiorari other than the alleged extortion of their confessions admitting their guilt.

The learned Justices of this Court having consented to hear this sole question proposed by petitioners Stein and Cooper, and having decided it adversely to them, nothing is left to review. The Court has decided these cases on the sole question presented by these petitioners. No other question of due process is available to them.

The majority opinion, at pages 32-34, emphasizes this fact:

V. "Here the evidence of guilt, consisting of direct testimony of the surviving victim, Waterbury, and the well-corroborated accomplice, Dorfman, as well as incriminating circumstances unexplained, is enough apart from the confessions so that it could not be held constitutionally or le-

gally insufficient to warrant the jury verdict. Indeed, if the confession had been omitted and the convictions rested on the other evidence alone, we would find no grounds to review, not to mention to reverse it."

Mr. Justice Jackson, speaking for the majority of the Justices at page 36 of his opinion, summed up the unanswerable argument to the complaints of the petitioners, Stein and Cooper, as follows:

VI. "But, whatever may have been the grounds of the Court of Appeals, we base our decision, not upon grounds that error has been harmless, but upon the ground that we find no constitutional error. We have pointed out that it was not error if the jury admitted and relied on the confession and was not error if they rejected it and convicted on other evidence. To say that although there was no error in the trial an Appellate Court must reverse would require justification by more authority than we are able to discover."

We pass over as unworthy of reply, the ten criticisms set forth at pages 3, 4 and 5 of the Stein and Cooper petition, such criticisms relating to fact statements contained in the majority opinion of the Court delivered by Mr. Justice Jackson. Whether, Waterbury, the driver of the Reader's Digest truck, released himself after being tied up by the petitioners Stein and Wissner after the murder of Andrew Petrini, or whether someone else released him has no bearing on the sole question before the Court, to wit, the admissibility of the confessions of Stein and Cooper. Neither does it matter whether two police officers or three arrested Cooper, or whether two or three alibi witnesses testified for Wissner.

At pages 5, 6 and 7 of the Stein and Cooper petition, great stress is laid upon the testimony of Trooper Crowley at page 1686 of the record that he did not notice anything abnormal about the arms of the petitioner, Stein, at the time of his arrest at 2 A. M. on June 6, 1950, at the apartment of his brother, Lou Stein. There is no proof in the record that Crowley examined Stein's arms or paid any particular attention to them at this time or any other time.

Most significantly, however, petitioners' counsel pass over in silence the fact that Lou Stein, the brother of petitioner, Stein, was not called as a witness on the trial as to the physical condition of Stein at the time of his arrest although Lou Stein was present at the time of the arrest (1958-1960). (Numerals in parentheses are page references to the certified Record on Appeal to the New York Court of Appeals unless otherwise indicated.) None of the three petitioners called any witnesses to testify as to their physical condition prior to their arrest. The wife of petitioner, Wissner, was with him at the time of his arrest, but she was not called to testify as to the physical condition of her husband just before his arrest nor was his daughter who testified as to an alleged alibi, which testimony was evidently rejected by the jury as incredible.

Moreover, the testimony of New York State Police Captain Glasheen to the effect that Wissner had injuries and had been receiving medical treatment prior to his arrest (2026) prompted a declaration by Wissner's trial counsel that he would produce medical records or X-rays to show that such treatment had nothing to do with the condition of Wissner at the time he arrived at the Westchester County Jail (2027). Very significantly, no such medical records or X-rays were ever produced by Wissner's astute trial counsel, nor were any medical experts

called by him to establish Wissner's injuries prior to his arrest.

Reverting for the moment, to the bruising of the left bicep area of Stein, which was the only evidence of injury found by Dr. Vosburgh on the morning after the arraignment (1737-1738) the doctor stated that such bruising could have been caused by the strong grip of a police officer at the time of Stein's arrest (1739-1740). Stein was fifty-two years of age at this time (1734 and 1739). What could be more sensible than for a police officer to take a strong grip upon a suspect being taken into custody on a murder charge? Crowley, the police officer, did not take part in the questioning of Stein prior to his confession (1691).

What is now to be said also by the long-experienced counsel for Stein, who admitted as a witness on the trial, that he knew Stein for nineteen years (1845) that he appeared in open Court in this case with Stein on June 16, 1950, when Stein entered a plea of not guilty to the murder indictment and yet he did not complain to the County Judge that Stein had been mistreated by any police officer nor did the petitioner, Stein, despite his previous record, himself complain to the County Judge? (1848). Nor did this resourceful attorney complain in Chambers during a conference with the County Judge, after the not guilty plea had been taken, that Stein had been mistreated, beaten or threatened (1849).

All this, despite the fact that this resourceful attorney who argued the Stein appeal before the Justice of this Court on December 18, 1952, had testified as a witness on the trial that he had visited Stein in the Westchester County Jail on June 9, 1950, one week before Stein's arraignment in open Court to plead to the murder indictment.

What is to be said by petitioner, Stein, as to this legal vacuum? Finally, counsel for Stein admitted, as a witness on the trial, that he did not know of his own knowledge when or where Stein sustained the bruises complained of (1850).

This disposes of the fallacious assertion at page 8 of the Stein-Cooper petition that "admitted injuries and bruises" were received by Stein between the time of his arrest and the time of his arraignment. There is no such proof in the record.

Although Trooper Crowley testified on two separate occasions during the trial (1684; 2382) and although he was one of the arresting officers of Stein, he was never examined by any of the trial counsel for any of the three petitioners concerning alleged mistreatment of any of the petitioners who were represented by three of the most skillful trial lawyers in the Metropolitan area of New York City.

While it is axiomatic that it is futile for defeated counsel to argue with a jury concerning its verdict on the facts, or as to credibility of witnesses, nevertheless, petitioners' counsel would, in effect, set themselves up as a reviewing body to challenge the guilty verdicts of the jury and to strike down the ruling of the trial Judge denying their motions for a new trial. Moreover, they denounce the unanimous affirmance of the convictions of all of the petitioners by the seven Judges of the New York Court of Appeals and they take exception to the affirmance of the New York Court of Appeals judgments by the majority of the Justices of this Court.

Petitioners' counsel also quarrel with Justice Jackson's comment on the failure of the petitioners to reveal their possible freedom from violence prior to their arrest. Of course, they had an absolute right to refuse to testify

if they felt that their prior criminal records would destroy their credibility. However, witnesses could have testified as to the physical condition of these petitioners prior to their arrest. Who decided that such witnesses should not be called and why were they not called on this issue?

While police officers, at page 10 of the Stein-Cooper brief, are laid open to an imputation of perjury, nevertheless, it is no gigantic fiction at variance with the facts of life, that police officers in New York State and in the other States of the Union lay down their lives week in and week out for our people. Members of the New York State Police have been murdered by desperate criminals while performing their duties and it is no myth that they take their lives in their hands every moment that they are on patrol.

On the other hand, the most naive student is well aware that hardened criminals, such as these three petitioners have no respect for life or property and will stop at nothing to achieve their nefarious purposes.

We must correct the erroneous statement at page 12 of the Stein-Cooper petition to the effect that the record shows no medical treatment of Wissner just prior to his arrest. The record shows just the opposite at pages 2026 to 2028 inclusive. Such information was furnished by no less a person than Wissner's brilliant trial counsel.

At page 16 of the Stein-Cooper petition, we find sorrowful complaint about the Court's comment on the "way of life" of all of the petitioners prior to their arrest in the cases at bar. With disarming effrontery, petitioners' counsel say there is nothing "*in or out of the record*" to suggest involvement of any of them in any violence prior to arrest. We remind the Court of the irrefutable evidence to the contrary during the six weeks' period prior to the murder of Andrew Petrini in the instant cases. The tes-

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timony of the accomplice Dorfman, with no prior criminal record, buttressed by the testimony of Homishak, shows Cooper and Stein travelling around New York City and adjoining Westchester County with loaded pistols and revolvers at various times for some weeks prior to the Petrini murder; that Stein and Cooper approached Dorfman six weeks before the murder with suggestions to hold up the Reader's Digest truck, and that Cooper, Stein and Dorfman had "eased" the Reader's Digest area with the knowledge and consent of Wissner as pointed out by Mr. Justice Jackson at page 6 of his opinion.

Was this the way of life of a "carpenter", "an itinerant jewelry salesman" or one engaged in the "automobile rental business" as so benignly stated at pages 16 and 17 of the Stein-Cooper petition? What do the petitioners hope to gain by such statements? All of this, including the criminal records of all of the petitioners were before the New York Court of Appeals despite the protestation of petitioners to the contrary (100-101-102).

At page 18 of the Stein-Cooper petition the bald statement is made that this Court's ruling that the three petitioners were not inexperienced in the ways of crime is based on "matters dehors the record". The criminal records of the three petitioners printed at pages 100, 101 and 102 in the record contradict this statement.

Again we contradict the gratuitous statement at page 21 of the Stein-Cooper petition that as to Stein: "that between the time of his arrest and the time of his confession he sustained injuries of a manifest and substantial nature." No evidence appears anywhere in the record that Stein was injured after his arrest. This is also true as to Cooper and Wissner. (If the bruises in the left bicep area of Stein's arm were sustained at arrest or after, they were medically traceable, as has been discussed, to a grip

by an officer, who took him into custody and did not participate in the questioning.)

All of the petitioners failed at all times during the trial to convince the trial Judge that any physical or mental coercion had been exerted against them at any time. All of the petitioners failed to convince even one of the seven Judges of the New York Court of Appeals that the confessions of Stein or Cooper were the products of mental or physical duress. Otherwise, the verdicts of guilty would have been set aside by the trial Judge and by the Court of Appeals under the doctrines established in *People v. Cram*, 272 N. Y. 348; *People v. Vallétti*, 297 N. Y. 226, and *People v. Leyra*, 302 N. Y. 353, 98 N. E. (2d) 553.

In *People v. Vallétti*, 297 N. Y. 226, the Court of Appeals reversed the judgment of death because the Court felt that the defendant's confession had been coerced. At page 231 the Court reiterated its traditional stand on this issue:

"Many a criminal record which comes to us contains a confession, and conflicting testimony as to whether or not the confession was extorted from the defendant. If there is a fair question of fact as to this, the jury's verdict is not interfered with. But a confession is not proof at all unless it be a free act. This court must see to it that a reasonable doubt on this score is resolved in favor of a defendant, and, in capital cases, we are commanded also to deal with the weight of evidence (*People v. Cram*, 272 N. Y. 348, 350)."

Also, in *People v. Leyra*, 302 N. Y. 353, 98 N. E. (2d) 553, the New York Court of Appeals reversed the judgment of death because the seven Judges unanimously found that the defendant's confession had been extorted through mental coercion. At 302 N. Y. 364 the Court emphasized that the admission in evidence of a coerced confession

will vitiate a verdict of conviction, and also cited many decisions of The Supreme Court of the United States as authority for this proposition and said:

"We have held that an involuntary confession is by its very nature evidence of nothing (*People v. Valletutti, supra*, p. 231). Moreover, our Federal Constitution (14th Amendt.) is a bar to the conviction of any individual in our courts of justice by means of a coerced confession (*Ashcraft v. Tennessee, supra*). We have a like provision in section 6 of article I of our State Constitution. A denial of due process has been defined as the failure to 'observe that fundamental fairness essential to the very concept of justice. * * * * Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt' (*Lisenba v. California*, 314 U. S. 219, 236-237.) Not only is the use of a coerced confession in obtaining a verdict a violation of due process, but, if such confession is admitted in evidence, that is sufficient to void the conviction regardless of other evidence which might nevertheless demonstrate guilt (*Malinski v. New York*, 324 U. S. 401, see, Note, 93 L. Ed. 115; *Watts v. Indiana*, 338 U. S. 49; *Turner v. Pennsylvania*, 338 U. S. 62; *Harris v. South Carolina*, 338 U. S. 68; *Haley v. Ohio*, 332 U. S. 596; *Ashcraft v. Tennessee, supra*; *Chambers v. Florida*, 309 U. S. 227).

"We recognize that due process is not lacking where upon facts permitting different conclusions it is left for the jury, under a proper submission, to say whether or not there was coercion (*Malinski v. New York, supra*; *Lisenba v. California, supra*; *Lyons v. Oklahoma*, 322 U. S. 596)."

Under the doctrines of *People v. Valletutti* and *People v. Leyra, supra*, the Court of Appeals would necessarily have reversed the convictions in the cases at bar if the Court

found evidence that the confessions of Stein and Cooper had been coerced. The fact that the Court of Appeals unanimously affirmed the convictions should conclusively prove to the satisfaction of the most partisan that the Court of Appeals found no evidence in the record to show that either of the confessions had been coerced.

In *People v. Crum*, 272 N. Y., 348, the New York Court of Appeals emphasized that the seven Judges of this Court in a capital case are obliged to weigh the evidence and form a conclusion as to the facts.

Chief Judge Crane, at 272 N. Y., pages 349 and 350, said:

"The Constitution of this State in Article VI, Section 7, provides that the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. 'This', said the court in *People v. Gaffey* (182 N. Y., 257, 259), 'enables us to review the facts in capital cases as we always did'. A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt."

We feel that the constitutional power granted to the Court of Appeals in capital cases by Article VI, Section 7, of the New York State Constitution should be emphasized here:

"The jurisdiction of the Court of Appeals shall be limited to the review of questions of law except where the judgment is of death, * * *."

Section 528 of the New York Code of Criminal Procedure defines the powers of the Court of Appeals in capital cases as follows:

"When the judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial; whether any exceptions shall have been taken or not in the court below."

It is obvious that in the instant cases the Court of Appeals did not order a new trial because the Court was satisfied that the verdicts were not "against the weight of the evidence or against law". Evidently the Court of Appeals did not feel "that justice requires a new trial".

After commenting upon this statutory grant of power to the Court of Appeals and pointing out that the review in the Court of Appeals "afforded petitioners a review with a latitude much wider than is permitted to us", Mr. Justice Jackson, writing for the majority of the Justices in the cases at bar, emphasized the extent of the review in the Supreme Court as follows, at page 14 of his opinion:

"Although, even within this range, the Court of Appeals found no cause for upsetting this conviction, our review penetrates its judgment and searches the record in the trial court." (97 L. Ed. (Advance, p. 1017).)

The fact that this Court deliberated for six months after the argument before affirming the convictions in these cases indicates that this Court did penetrate the judgments of affirmance in the Court of Appeals and did search the record in the trial Court and was satisfied that there were no violations of due process.

Faulty reasoning in some quarters has given rise to the false impression that this Court has held that the convic-

tions in the cases at bar may be properly affirmed even though the confessions of Stein and Cooper were extorted, and were considered by the jury, provided that other sufficient independent evidence appears in the record to warrant the conviction of the petitioners. Counsel for the petitioners seem to share this erroneous notion.

We respectfully submit that this Court has made no such ruling. We urge that this Court has found that the Jury could properly decide that the confessions of Stein and Cooper were not coerced. Further, the Court has held that, even assuming that the Jury rejected the confessions as coerced, sufficient independent evidence appears in the record to justify the convictions of all of the petitioners and that the Jury was justified in convicting all of the defendants on such independent evidence.

We must assume that the Jury obeyed the instructions of the trial Judge at pages 2765, 2766 and 2767 of the record to the effect that they must disregard the entire statements of the petitioners, Stein and Cooper, if the Jury found that they were not freely and voluntarily made, or even if the Jury entertained a reasonable doubt on this issue.

It is fundamental law that an Appellate Court will assume that a trial jury will obey instructions of a trial Judge to disregard incompetent evidence. (*People v. Wilson*, 141 N. Y. 185 at 191; *Greenfield v. The People*, 85 N. Y. 75, 90, 91; *People v. Warder*, 231 N. Y. App. Div. 215, 247 N. Y. Supp. 60 at 66.) The unanimous opinion of the Appellate Division of the New York Supreme Court in the *Warder* case was written by Mr. Justice Finch, who later served with great distinction in the revered New York Court of Appeals.

Acceptance of any other fallacious theory that an American jury would disregard the careful and painstaking instructions of the trial Judge concerning the question

of the voluntariness of the Stein and Cooper confessions would result in a total destruction of the entire jury system. Under this reasoning, no jury verdict on the facts could ever be sustained; simply because disgruntled and disappointed criminals have been justly convicted.

The process by which the Court arrived at this opinion is in conformity with the method discussed by Mr. Justice Frankfurter in *Stroble v. California*, 343 U. S. 181, at 202, 203:

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“The question whether or not a confession is coerced involves a complex judgment upon facts inevitably entangled with assumptions and standards which are part and parcel of the ultimate issue of constitutionality * * * moreover items of evidence may be undisputed but not their meaning.”

Recognition of this is found in the dissenting opinion by Mr. Justice Frankfurter that the majority opinion is a “conscientious interpretation of the record differing from mine”.

The respondent urged in its brief and upon the argument that the conviction should be sustained because of the previous holdings of this Court and urged the Court to follow its rulings in *Lisenba v. California*, 314 U. S. 219 and in *Gallegos v. Nebraska*, 342 U. S. 55 (see page 50 of respondent's brief). It is respectfully submitted that the instant opinion is in conformity with the prior holdings of the Court.

ANSWERING THE PETITION OF WISSNER

Respondents submit that the clear holdings of the Court of Appeals of the State of New York in *People v. Leyra*, 302 N. Y. 353, 364, demonstrate that that Court reviewing the facts must have held that the submission to the jury

of the voluntariness of the confession as a question of fact was not error and further that that Court reviewing the evidence must have been satisfied that the confession was not coerced. Upon the oral argument in that Court and with all counsel present who are now counsel for the petitioners, the counsel for the respondent was specifically asked by the Court whether we conceded that if the Court of Appeals found the confession to have been coerced the Court must direct a new trial. Counsel answered that we so understood and the oral argument for the respondent proceeded upon that basis.

We submit that petitioner has misinterpreted the Court's language with respect to the necessity of a strong charge disapproving compromise verdicts with the following paragraphs concerning the propriety of the general verdict (21 L. W. 4475). It is the question with respect to the use of confessions as "makeweights in a compromise verdict" which was not raised in the briefs and not asked to be charged in a request by the respondents at the trial. We interpret this opinion as a recognition of the request for the special verdict on the voluntariness of the confession and a statement that the general verdict is customary and constitutional. Again the defendants in New York in a capital case are fully protected by the full review powers of the Court of Appeals.

Petitioner Wissner urges also that only incidentally did he discuss his argument on the alleged unfairness of the New York procedure on confessions. His counsel argues this point before the Court and it takes up four pages in the reply brief of the petitioner's as Point II, submitted to this Court early in January, 1953.

Respondents do not interpret the Court's opinion as holding, as Wissner alleges as his third point, that the use of a coerced confession may be harmless error. The Court specifically has said that "reliance on a coerced confession vitiates a conviction" * * * forced confessions will void

State convictions]". This Court has clearly stated the accepted principle that a confession which is held by the Court or by the highest Appellate Court of a State to have been coerced, must vitiate the conviction, but where the facts and inferences are disputed and the confession, cannot be held as a matter of law to have been coerced, then the submission to the jury of the issue is proper and the quantity of other evidence of guilt clarifies the propriety of the verdict.

This Court has consistently stated that the findings of the State Courts will not prevent them from reviewing the entire record. So also this Court in discussing confessions has considered whether evidence of guilt existed outside of the confession (see *Harris v. South Carolina*, 338 U. S. 68 and *Ashcraft v. Tenn.*, 322 U. S. 143). In any event the argument that this Court without the confessions could not find constitutionally sufficient evidence to sustain the convictions is fully answered by this Court. "Indeed, if the confession had been omitted and the convictions rested on the other evidence alone, we would find no grounds to review, not to mention to reverse it" (21 L. W. 4479).

A discussion by petitioner Wissner's counsel as to the lack of cross examination of the witnesses against him was argued before (Wissner's brief, pages 14, *et seq.*) and answered (Respondent's brief, pages 50 to 59). The Trial Court very clearly charged the jury as set forth on the cited pages of our original brief that the confessions were not evidence against Wissner. If they are not evidence then they are neither witnesses nor accusers nor depositions nor *ex parte* affidavits used against him, and the claim of the loss of right of confrontation falls with the lack of the basis for the argument.

THE PETITIONS FOR REHEARING SHOULD BE DENIED

This lengthy opinion followed exhaustive briefing of the cases and full oral argument under the rules of this Court and a period of more than six months, which was obviously devoted to full review of the records, briefs and of the authorities on the questions involved. The opinion so deliberately arrived at should be accepted as the law and a determination of the case. The petitions for leave to re-argue should be denied.

Dated, White Plains, N. Y., July 22, 1953.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 16 Misc. 393 392

NATHAN WISSNER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

On Petition for a Writ of Certiorari to the County Court of
Westchester County, State of New York

L. MAURICE WORMSER,
J. BERTRAM WEGMAN,
RICHARD J. BURKE,
Counsel for Petitioner.

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The respondent proceeds upon an apparent misconception of the nature of petitioner Wissner's complaint. Petitioner does not contend that a joint trial of two or more defendants may never be had where one defendant has confessed, or that juries are incapable of following instructions, nor does petitioner "inferentially denounce our jury system", as respondent professes to suppose. These are straw men: they do not touch the point petitioner actually raises.

Petitioner's point is that in the peculiar circumstances of his case there occurred an absolutely unprecedented departure from the principle of due process of law, and thus there is necessarily present a constitutional question not heretofore considered either by the New York courts or by this court. None of the cases cited by the respondent deal with this problem. These circumstances are as follows:

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(1) The case against petitioner—who had not confessed—was *notably weak*, apart from the references to him in the confessions of his co-defendants,

(2) The confessions of not one but two co-defendants named him a total of 88 times, accusing him of being the person who fired the fatal shot,

(3) A separate trial, sought for that reason, having been denied, the Court *refused* to delete his name from the confessions when he repeatedly *requested* such protection,

(4) The references to him, which the Court had *refused* to delete, were effectively used against him by the prosecutor and the Court itself.

Respondent's reference to Wigmore on Evidence (at p. 54 of its brief), is not apposite, although many of the American cases cited by Wigmore, *do* require the names of defendants, other than the confessor, to be deleted from the confession. Some of these are *People v. Buckminster*, 274 Ill. 435, 113 N. E. 713, *People v. Durand*, 321 Ill. 526, 152 N. E. 569, *Miller v. People*, 98 Colo. 249, 55 Pac. 2d, 320, *People v. Sweetin*, 325 Ill. 245, 156 N. E. 354, *People v. Blumenfeld*, 351 Ill. 87, 183 N. E. 815.

But in none of the cases cited by Wigmore, nor in any other cases that have been found, did the defendant (as here) specifically *request* the deletion of his name from the confessions of his co-defendants.

In the present case, the Trial Court explicitly adverted (R. 1280) to its familiarity with the *Malinski* case (324 U. S. 401), and was therefore presumably familiar with this Court's description (at p. 411) of the method there adopted for protecting the other persons named in Malinski's confession, viz., the deletion of their names; but, despite its familiarity with that procedure, it repeatedly refused, *without reason*, petitioner's urgent request that it be adopted.

Nor has any reason ever been expressed at any stage of this case—not even here in respondent's brief—why peti-

tioner's name should not have been deleted from the confessions as read to the jury, why this obviously highly prejudicial ex parte testimony should have been insinuated into the jurors' minds. Other deletions were made, but not these.

This is not a situation involving a question merely of state procedure rather than due process. As was said in *Snyder v. Massachusetts*, 291 U. S. 97, 116-117, "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. * * * What is fair in one set of circumstances may be an act of tyranny in others."

And in *Lisenba v. California*, 314 U. S. 219, 236, this principle was expressed as follows:

"The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce such rule as she elects, whether it conform to that applied in the Federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law."

Thus, for example, this Court has, under certain circumstances, upheld the right of the states to withhold from a defendant the assistance of counsel, and in other circumstances has found in such case an invasion of the defendant's Fourteenth Amendment right to due process, saying in *Gibbs v. Burke*, 337 U. S. 773, 781,

"The due process clause is not susceptible of reduction to a mathematical formula. * * * Obviously a fair trial test necessitates an appraisal before and during the trial of the facts of each case to determine whether the need for counsel is so great that the deprivation of the right to counsel works a fundamental unfairness."

Here the question is whether, *under the special and unusual circumstances of this case*, the deliberate refusal of the Trial Court to delete the petitioner's name from the co-defendants' confessions worked a fundamental unfairness.

It cannot be doubted that the right to cross-examine one's accusers is basic in our system of jurisprudence; *** these rights include, as a minimum, a right to examine the witnesses against him ***." *Re Oliver*, 333 U. S. 257, 273. The policy of the due process of law clause of the Fourteenth Amendment was stated in *Williams v. New York*, 337 U. S. 241, 245, to be "in part that no person shall be tried and convicted of an offense unless he *** is afforded an opportunity to examine adverse witnesses."

New York could not validly legislate, or decide in so many words, that a defendant at a criminal trial would not be permitted to cross-examine the witnesses produced against him. What it could not do directly it ought not be permitted to do by indirection.

To speak of petitioner's point as involving a matter merely of state procedure, is to permit sterile semantics to pervert the realities of the situation. The realities are that at a trial for a capital offense, where the evidence against him would otherwise have been weak, the Court insisted upon permitting his two co-defendants, in effect, to testify against him without subjecting themselves to cross-examination.

The refusal to delete Wissner's name from the confessions of his co-defendants, when such protection was requested, had the effect of converting those confessions into lengthy and detailed accusations against Wissner, and enabled the Trial Court, in its charge to the jury, to stress portions of the confessions which were *accusatory* of Wissner, rather than against the interest of Cooper and Stein. (Such accusations will be found quoted at the bottom of page 21 and the top of page 22 of petitioner's brief in support of his petition for a writ of certiorari.)

To say that under such circumstances a trial is permeated with fundamental unfairness is not at all to say (as respondent claims) that a joint trial can never be conducted fairly, or that instructions to a jury can never be adequate protection. It is to say that in the unprecedented circumstances here present, the joint trial was not fairly conducted, and instructions here given to the jury were not and could not be adequate protection.

It is in order to conceal those circumstances that respondent seeks, by omission and by distortion, to gloss over the weakness of the evidence actually admissible against Wissner. Thus, it discusses the identification by the witness Waterbury of Wissner as a participant in the robbery, without any mention of the circumstances which rendered such identification incredible, viz., that although Waterbury agreed he had seen the man who did the shooting for only a couple of seconds, and claimed that the man wore a *large false nose* attached to the frames of a pair of eyeglasses, without any glass in them, under a felt hat, he nevertheless purported to be able some months later to identify Wissner as that man. Nor does the respondent refer to the amazing circumstance that Waterbury, in his statement to the District Attorney one hour after the crime, not only omitted all reference to the false nose and eyeglass frames, stating merely that none of the robbers wore masks, but was also unable to state whether they wore hats or to describe their clothing. At the trial, however (*after* the State Police had found fragments of a false nose and eyeglass frames a mile and a half from the scene of the crime, and after Cooper and Stein, in their confessions to the police, had purported to describe the clothing allegedly worn by Wissner) Waterbury affected to remember the hat and jacket supposedly worn by Wissner, as well as the *false nose* and empty eyeglass frames.

This was a witness who was unable to identify, at the trial, when they were severally brought into the courtroom for his inspection, any one of the seven much taller State Troopers whom he had examined at a police "line-up" with Wissner, although his opportunity to examine these Troopers in the "line-up" was far more protracted in time than had been his opportunity at the time of the crime to observe the disguised bandit. Strangely selective and phenomenal powers of observation and memory had to be attributed to a witness who, upon cross-examination, nevertheless gave as his answer to 386 different questions, "I don't remember".

Similarly, in discussing the testimony of the witness Homishak (respondent's brief p. 18) respondent would have Homishak testify that he saw Wissner, with Dorfman and the others, on the morning of the day of the crime "in the vicinity" of the Wissner-Dorfman rental agency, Homishak actually having testified not about "the vicinity" but that he saw them "in the office" of the rental agency. The misquotation is not inadvertent: the purpose is to soften the clash between the accomplice witness Dorfman and Homishak on this subject, Dorfman having said their meeting-place was not in the office, but in a restaurant in the vicinity. And, in the next sentence of its brief, respondent makes it appear that Homishak testified that Wissner "left the premises" with the other defendants on the morning of the day of the crime, whereas Homishak actually testified that—having himself left the premises—he was not present to see the defendants leave Wissner's place of business on that day and, hence, had no knowledge whether they had left together or separately.

Such distortion, unless pointed up, might conceal the fact that the case against Wissner in actuality depended entirely upon the testimony of the disreputable accomplice Dorfman, there being no other testimony to connect him with the crime, absent the confessions of Cooper and Stein.

The weakness of the case against him was one of the elements distinctive of this case which, in combination with the Court's ruling at the joint trial refusing him effective protection against the crushing effect of the two other defendants' confessions resulted in fundamental unfairness as to petitioner.

We earnestly urge that the Petition should be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952

No. 392

NATHAN WISSNER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITIONER'S BRIEF

I. MAURICE WORMSER,
J. BERTRAM WEGMAN,
RICHARD J. BURKE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

1

No. 392

1, 19

NATHAN WISSNER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent

PETITIONER'S BRIEF

Opinion Below

The Court of Appeals of the State of New York affirmed without opinion the conviction of and the death sentence imposed upon petitioner, 303 N. Y. 856.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1257, and Rule 38 of the Rules of the Supreme Court of the United States, on the ground that petitioner was denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States in that he was deprived of due process of law in the proceedings below. This Court granted his petition for a writ of certiorari on October 13, 1952.

Specification of Errors Assigned

Petitioner, who had made no confession of guilt, was deprived of due process of law at his joint trial with two other persons who had confessed, by the admission into evidence of their two confessions inculpating petitioner, without deletion therefrom of petitioner's eighty-eight times repeated name, when the confessions of the co-defendants were concededly obtained after prolonged questioning, ~~incommunicado~~, by police working in relays, during an illegal delay in arraignment—an issue existing as to whether the confessors were beaten.

Statement of the Case

On December 21, 1950, your petitioner, together with Calman Cooper and Harry A. Stein, was convicted of murder in the first degree, after a joint trial before a jury, by the County Court of Westchester County, State of New York, and was sentenced to death. The conviction was for a homicide committed "without a design to effect death by a person engaged in the commission of a felon" (N.Y. Penal Law, Section 1044, subd. 2, set forth in the appendix).

The facts may be briefly stated as follows:

On April 3, 1950, at about 3 P. M., four persons held up a Ford truck, owned by the Reader's Digest Association, on a private roadway leading from the Reader's Digest plant at Chappaqua, New York. The truck was being driven by William Waterbury who was accompanied by a guard, Andrew Petrini. A single shot fired by one of the robbers standing on the roadway passed through the window glass of the door of the truck and caused Petrini's death.

The perpetrators of the crime escaped unapprehended, with three bags containing checks and currency, the property of the Reader's Digest Association.

Just over two months later, in the early morning of June 5, 1950, Calman Cooper, in the company of his elderly father, was arrested on the street in New York City; both were taken to the State Police Barracks at Hawthorne, New York. There Cooper was held, clothed and handcuffed continuously, in an office room, incomunicado, for four days until his arraignment on the night of June 8th. In the meantime he was interrogated by State Police officers working in relays, according to their testimony (R. 1312-1313, 1317, 1361, 1403-1404, 2072, 2087, 2103)¹ on June 5th and June 6th for at least a total of twenty hours. His questioners were Officers Sayers, Buon and Barker (R. 1361, 1403).

At 10:45 P. M. on June 6th he commenced to confess, and signed a typewritten question and answer statement at 2 A. M. on the morning of June 7th. During this time his father, as well as his brother, who had also been arrested on June 5th, were confined and likewise held incomunicado by the State Police at the barracks.

Harry A. Stein was arrested in New York City at 2 A. M. on June 6th, 1950. He too was taken to the State Police Barracks at Hawthorne and there held, clothed and handcuffed continuously, in a locker room, incomunicado, until his arraignment on the night of June 8th. He was arrested at the apartment of his brother, who communicated with an attorney on his behalf in the early morning of June 6th, but the attorney, despite repeated and vigorous efforts, was unable to locate Stein until after the arraignment. Stein was interrogated by the State Police officers working in relays, according to their testimony (R. 1905-1909, 1925-1926, 1931) on June 6th and June 7th for at least fifteen hours. His questioners were Officers Glasheen and Johnson (R. 1909, 1926). He commenced to confess

¹ References thus are, unless otherwise indicated, to the pages of the Record.

around 10 A. M. on June 7th and about 4:30 P. M. on that day signed a typewritten question and answer statement.

Wissner was arrested on June 7th at about 9 A. M. in New York City and carried off to the same barracks at Hawthorne. He, too, was interrogated but he made no confession. Instead he steadfastly maintained his innocence (R. 2030, 2245). He, too, was held incommunicado until the night of June 8th before being arraigned. His wife was arrested with him and taken to the same State Police Barracks, where she, too, was held incommunicado until June 8th when, as a condition of her liberation from confinement there, the police required her to execute a release absolving the State Police Sergeant from liability (Ex. 8, printed R. 2960, offered R. 2255).

The District Attorney of Westchester County testified that he became aware on the afternoon of June 7th that Cooper had been in custody since the morning of June 5th. Cooper had not yet confessed at that time, nor had Stein who was also in custody. All three defendants continued to be held incarcerated without being arraigned before a Magistrate until 10 P. M. on June 8th, 1950, and then the charge against them at the arraignment was made in the form of an affidavit "upon information and belief" by the State Police Sergeant, the grounds of said information and belief being stated to be the aforesaid confession of Calman Cooper (Ex. 60 for id., printed R. 2891-2892, marked R. 1271).

The Trial Court ruled as a matter of law that the delay in arraignment of the three defendants was unnecessary and hence illegal, being in violation of state statutes (Sec. 1844, N. Y. Penal Law; Sec. 165, N. Y. Code Crim. Proc., set forth in the appendix).

Immediately after the arraignment all three were lodged in the County jail, where they were held each in solitary confinement, in widely separated cells.

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Early on the following morning (June 9th) they were separately examined by the prison physician.

On Cooper he found bruises on the left side of the chest, also on the abdomen, also in the right bicep area, and also on both buttocks.

On Stein the physician found bruises in the left bicep area (so he reported, at least). An attorney who examined Stein the same day observed bruises on both arms and on the area below the left breast.

On your petitioner Wissner, who had made no confession, the prison physician observed the most extensive injuries: there were bruises on the left side of the chest; the fifth rib on the left side was broken; there were also abrasions of both shins, bruised areas on the thighs, the left side of the abdomen, and the buttocks; and there was a bump on the head.

Objection was made by all the defendants to the admission in evidence of the Cooper and Stein confessions as having been obtained by unconstitutional means (R. 1381, 1275-1280, 1967, 1900, 1583). The prosecution denied that physical brutality had been employed, but presented no testimony to explain how all three defendants in the same case had simultaneously acquired such injuries. The police witnesses themselves established however so that it cannot be disputed—that the confessions were obtained after prolonged intensive questioning by relays of questioners during an extended illegal delay of arraignment while the prisoners were held incommunicado without access to family, friend or counsel, or notice of their rights.

Wissner further objected to their admission to evidence, no matter how obtained, in a trial in which he was one of the defendants, on the ground that he would be so unalterably prejudiced by them, despite any instruction from the Court, that it would become impossible for him to have a fair trial,

and asked a severance of his case from the others. The objections overruled and the severance denied; he importuned the deletion of his name from the confessions; that, too, was refused.

The gist of the confessions obtained from Cooper and Stein was that they had committed the crime together with Wissner and one Dorfman, who was Wissner's partner in an auto-renting business on New York's lower East Side.

Dorfman, accompanied by an attorney, surrendered to the District Attorney on June 19, 1950, after he had taken the precaution of having his body photographed and examined by a physician prior to surrendering. Subsequently, after his wife had been imprisoned and long held in custody, he became a witness for the prosecution and his wife was then released; his case was severed from that of the other defendants at the beginning of the trial, and it does not appear that any disposition was made of the indictment as against him.

This accomplice witness, Dorfman, furnished the main testimony against Wissner, and placed him at the scene of the crime. As to numerous details, however, his testimony was hopelessly inconsistent with that of other witnesses called by the prosecution, as well as with the confessions of Cooper and Stein. The Reader's Digest truckdriver, Waterbury, identified Wissner, whom he claimed to have seen for only a couple of seconds, and testified that this petitioner was, at the time, wearing a felt hat, the frames of a pair of spectacles without any glass in them and with a large false nose suspended from the frames. This witness had made a statement to the District Attorney one hour after the hold-up however, which was stenographically recorded, in which he made no mention whatever of *any* of these striking and bizarre details, in which he was able to describe only one of

the robbers as "a heavy set fellow who wore glasses", and in which he averred that the robbers had worn "no masks".

There was no other testimony offered that connected this petitioner with the commission of the crime; however, two other prosecution witnesses were called to show prior and subsequent association by the defendants.

This petitioner moved in advance of the trial for a severance and a separate trial, alleging that it would be impossible for him to obtain a fair trial—he not having confessed—if he were tried jointly with two other defendants who had made confessions implicating him (R. 38-40). This motion was denied.

At the outset of the trial after the District Attorney's opening statement (R. 158-159), also when each of the confessions was offered in evidence (R. 1519, 1967-1968), also when the contents of each confession were being considered by the Court, and at numerous other appropriate times during the trial (R. 1451, 1455-1457, 1900, 1995, 2277-2278, 2529), this petitioner reiterated his application for a severance and a separate trial, stating that he was being deprived of the right to confront the witnesses against him (R. 1900, 2529, 2277-2278).

Since all of these motions were denied, he urgently importuned the Trial Court *at least* to delete his name from these confessions in order to minimize the inevitable prejudice to him from their introduction in evidence (R. 1502, 1503, 1504, 1505-1514, 1888, 1890, 1891, 1893), reiterating that he could not confront the witnesses (R. 1897). His name was mentioned *eighty-eight times* in the confessions, together with the most detailed and prejudicial accusations against him. Nevertheless, this minimal safeguard of his rights was summarily refused.

Having summarily denied even such minimal safeguard against prejudice, the Trial Judge in summarizing the con-

fessions in his charge to the jury, himself gave minutely detailed prominence to the accusations against this petitioner contained therein. Further reference to this anomaly is made, with pertinent excerpts, *infra*, pp. 21-22.

If it is true that the Trial Court gave lip service to this petitioner's rights at a point in its charge separated by fourteen pages from this discussion of the contents of the confessions, by a perfunctory statement that the confessions were only to be considered against those making them.

The District Attorney in his summation to the jury also read inflammatory extracts from each of the confessions, similarly selecting only portions thereof dealing with this petitioner.

POINT I

The Admission of the Coerced Confessions of the Other Two Defendants, Without Elimination Therefrom of the Accusations by Name Against Petitioner, Deprived Petitioner of His Right to Due Process.

A. The Confessions Were Inadmissible

At the trial, testimony was taken in the presence of the jury on the issue of the voluntariness of the confessions of Cooper and Stein, before they were admitted to evidence.²

² The defendants themselves did not take the stand. An unsuccessful effort had been made by Stein, in a different court, prior to the trial, to secure a judicial hearing out of the presence of the trial jury of the circumstances under which his confession was obtained. That application was supported by Stein's affidavit relating the horrifying details of the beatings and torture to which he was subjected—those papers being marked Exhibit II for Identification (R. 1843).

Unlike the federal procedure, a preliminary hearing at the criminal trial, out of the presence of the jury, on the question of the admissibility of a coerced confession is not permitted by the Courts of the State of New York. *People v. Randazzo*, 194 N.Y. 147, 159. Hence, a defendant is unable to present his own testimony on this particular issue without exposing himself to general cross-examination in the presence of the jury upon such extraneous matters as the merits of the charge against him, prior convictions for other crimes, etc.

No proof was offered by the prosecution to explain the extensive bruises, contusions and other indicia of injury found by the prison physician spread over all three defendants' bodies the morning after the night of their arraignment, even on such portions of the body as the buttocks, or to show that they were not caused by the blows of policemen. In his closing argument to the jury, the prosecutor's comment thereon was that these injuries "could have been self-inflicted". This cannot constitute a satisfactory accounting, except to the most eagerly credulous, considering that each prisoner admittedly was held in solitary confinement without opportunity for consultation. Also, upon this hypothesis, one has to assume that Wissner, who had made no confession to be explained away, immediately after arraignment broke his own rib, abraded his shins, and bruised his thighs, his abdomen, his head and his buttocks!

The Trial Court ruled that there was an issue of fact as to coercion to be determined by the jury, and hence admitted the confessions to evidence.

It is not possible to determine how the jury resolved this issue, inasmuch as the Trial Court declined to instruct the jury to acquit if they found the confessions to be involuntary (R. 2779, 2782). Instead, they were instructed, in that event, to reject the confessions in considering the evidence (R. 2767, 2769), and the District Attorney argued to them that there was sufficient evidence without the confessions.

The anomalous practice of the State of New York, therefore, first permits the jurors to become cognizant of the content of the confessions and then calls upon them to disregard the confessions (if involuntary) in appraising the rest of the proof. One need only read the confessions of Cooper and Stein to appreciate the utter impossibility of anyone performing this psychological feat. " * * * when the confessions and admissions had resulted in establishing

the truth and accuracy of the testimony given by [others], could the jury then weigh the credibility of that testimony over again, ignoring the very testimony which had already substantiated it? Certainly jurors are not accustomed to weigh evidence in that manner, and I confess that neither legal training nor long judicial experience has given me the ability to do so." (Lehman, J. dissenting in *People v. Fisher*, 249 N. Y. 419, 431-432.)

If the admission of the confessions denied a constitutional right to the defendants, the error would require reversal, regardless of whether the other evidence in the record was sufficient to justify the general verdict of guilty. *Lyons v. Oklahoma*, 322 U. S. 596, 597, footnote 1; *Malinski v. New York*, 324 U. S. 401, 404.

Even if one were to accept the disingenuous flat denials of the police that the defendants were beaten, the facts admitted by the prosecution witnesses rendered the admission of the confessions a denial of due process of law as expounded in *Watts v. Indiana*, 338 U. S. 49; *Turner v. Pennsylvania*, 338 U. S. 62; and *Harris v. South Carolina*, 338 U. S. 68. It is true that these cases were decided by a closely divided court. But counsel do not understand that this Court has ever departed from the propositions there laid down in a case where all the circumstances of the case required a similar disposition. Thus, in *Johnson v. Pennsylvania*, 340 U. S. 881, the petition for a writ of certiorari was granted and the conviction reversed without further hearing, upon the authority of *Turner v. Pennsylvania*, *supra*, with only two members of the Court dissenting. And as recently as April 7, 1952, this Court in *Stroble v. California*, 96 L. Ed. (Adv. Op.) 529, found occasion to mention with approval its condemnation of the "pressure of unrelenting interrogation" in *Watts v. Indiana*, *supra*.

The admission in evidence of a confession obtained dur-

ing illegal detention incommunicado, following persistent police interrogation, by relays of questioners, for a prolonged period, without preliminary hearing or the least suggestion of elementary rights, and without opportunity to consult or communicate with family, friend, or counsel, results in a denial of due process of law—certainly at least in a capital case where a serious issue exists whether, in addition, the defendants have been subjected to physical brutality. *Watts v. Indiana, Turner v. Pennsylvania, Harris v. South Carolina, supra.*

Here the arraignment of the three defendants was wilfully and wrongfully delayed, in violation of the statutes of the State (Sec. 1844, New York Penal Law; Sec. 165, New York Code of Criminal Procedure, set forth in the appendix), with the knowledge and clear acquiescence of the District Attorney himself.

The Trial Court eventually so ruled as a matter of law, in a supplement to its charge (R: 2777, at bottom), although in the body of the charge in the context of its discussion of factors pertinent to a determination of voluntariness, the Court had first erroneously submitted this, too, as a question of fact for the jury.

That Cooper and Stein were submitted to prolonged interrogation by relays of questioners during this extended period of illegal detention, while held incommunicado, handcuffed at all times, under constant armed guard, was conceded by the prosecution witnesses. Even according to the police version, each of these defendants was questioned persistently on two different days, in the case of Cooper for at least twenty hours, and in the case of Stein for at least fifteen hours. It is safe to assume, considering the source of the testimony, that these estimates were not inflated.

Of course, these defendants were not advised of their right to counsel—or, for that matter, of any of their rights

of which they were being effectively deprived—and indeed in the case of Stein, persistent efforts over a period of three days by an attorney to locate Stein were unsuccessful—a circumstance which the Trial Court, it might be noted in passing, seemed to consider immaterial. (R. 1834-5). Although these men had been arrested in New York City, where there was surely no lack of facilities, each was spirited away to an isolated State Police Barracks in Westchester County where there were no facilities at all for prisoners, and there secreted for days.

Nor were these defendants permitted to communicate with their family or friends. Cooper's elderly father, and his brother, were also arrested and likewise held incommunicado without arraignment; the prosecution affirmatively proved that Cooper was driven to the resort of bargaining for their release, in exchange for which it is said he "offered" to confess. (A strikingly similar circumstance was described in *Harris v. South Carolina*, *supra*, as a part of the complex of police conduct which there was held a deprivation of due process.)

Concerning all of the foregoing circumstances there is no contravening testimony.

As the then Chief Judge of the New York Court of Appeals wrote in his dissenting opinion in *People v. Malinski*, 292 N. Y. 360, 386:

"We cannot close our eyes to the fact that our frequently and solemnly repeated admonitions to law enforcement officers that they are not above the law and may not in their zeal to obtain convictions hold, without arraignment, persons suspected of crime, in order to have opportunity to obtain confessions, are often unheeded."

Such admonitions may be expected to continue unheeded, so long as cases such as the present one are affirmed without comment or corrective action by State Courts of review.

B. The Admission of the Confessions Violated Petitioner's Rights

In *Malinski v. New York*, 324 U. S. 401, this Court, while reversing the conviction of Malinski whose confession had been improperly obtained, remanded the case of Malinski's co-defendant, Rudish, to the New York Court of Appeals for further consideration by that Court, in view of the decision as to the invalidity of Malinski's conviction. This Court, in declining to reverse as to Rudish, emphasized the effort which had been made to protect Rudish from the effect of Malinski's confession by the deletion of Rudish's name therefrom, a procedure said to have had "the complete approval of counsel for Rudish". Upon the remand, the New York Court of Appeals ruled (*People v. Rudish*, 294 N. Y. 500, 501):

"Nevertheless, since the Supreme Court of the United States directed a new trial as to Malinski because one of his confessions was inadmissible, the defendant Rudish should, in the interest of justice, receive a new trial with that confession excluded."

In the case of your petitioner Wissner, not even such a colorable effort was made to protect him from the effect of his co-defendants' confessions. Instead, the Trial Court insisted, despite the strongest protestations, that the accusations of Wissner, by name, eighty-eight times repeated, remain and be submitted to the jury in the two confessions of the other defendants. Under the circumstances, if the constitutional rights of Cooper and Stein were violated by the admission of their confessions, only by the most sterile logic-chopping could it be said that Wissner's trial accorded him due process. The question, however, "whether under the Fourteenth Amendment a coerced statement may be excluded on objection of one not coerced into making it",

though hypothetically propounded in this Court's opinion in *Turner v. Pennsylvania*, 338 U. S. 62, 65-66, has still to be answered here.³

The fact that there were two confessions—naming Wissner a total of eighty-eight times—that both of his co-defendants had confessed—did not merely double the prejudice reasonably to be expected. By no mathematical computation can it be determined how much more prejudice results from such a situation, since the effect upon the jury of each confession must be many times multiplied by the circumstance that each is psychologically supported and substantiated by the other confession. It put Wissner in a position where all three of the other persons named with him in the indictment would testify against him, but he would be confronted by and permitted to cross-examine only one of them.

In *Snyder v. Massachusetts*, 291 U. S. 97, all members of the Court were in agreement that insofar as the right of confrontation entailed the privilege of cross-examining one's accusers, it was a part of the due process guaranteed by the Fourteenth Amendment, and the opinion states (at p. 107), in fact, that this is the real purpose of the privilege of confrontation as constitutionally protected:

"It was intended to prevent the conviction of the accused upon depositions or ex parte affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination."

³ In the *Malinski* case, *supra*, the case of Malinski's co-defendant Rudish was remanded to the New York Court of Appeals, rather than reversed, for the reasons stated immediately above in the text. In *Ashcraft v. Tennessee*, 322 U.S. 143, 155-156, Ashcraft's co-defendant Ware had also confessed his guilt. This Court remanded Ware's case to the Tennessee Supreme Court, stating that if that Court should reverse Ware's conviction, in the light of the reversal as to Ashcraft, there would then be no occasion for this Court to pass on the federal question raised by Ware.

See also *Re Oliver*, 333 U. S. 257, 273, and *Williams v. New York*, 377 U. S. 241, 245.

The procedure now complained of in the case at bar is pregnant with essential unfairness for the very reason that it resulted in the conviction of the petitioner upon inadmissible depositions, i.e., the confessions of Cooper and Stein, which repeatedly inculpated the petitioner, without opportunity for cross-examination.

If the denial of a separate trial could by any strained reasoning appear to be within the limits of discretion, then this was surely a case where it was necessary for prosecution and court to exercise a caution increasing in degree as the offenses dealt with increased in gravity, so as to avoid unfairness, assuming unfairness could be avoided under such circumstances. Instead, we find the Trial Court and District Attorney here managing the difficult problem of justice with which they were confronted in a manner which was bound to *insure* prejudice to Wissner from the joint trial. This case is not comparable in this respect to the *Malinski* case where this Court felt the circumstances there justified only a remand of Rudish's case to the Court of Appeals rather than outright reversal.

Wissner's counsel strenuously entreated the Court to delete Wissner's name from the two confessions which were to be read to the jury. One would suppose that that was the least that would have been done. Such a procedural device was not unprecedented. *Malinski v. New York*, *supra*, 411. The Trial Court explicitly adverted (R. 1280) to its familiarity with the *Malinski* case, and was therefore presumably familiar with this Court's description (at p. 411 of the Report) of the method there adopted for protecting Rudish, who had been named in *Malinski*'s confession; viz., the deletion of his name. But here the Court repeatedly refused, without reason, even this modicum of protection.

Why did the Court insist, over repeated objection and exception, in a case of this grave nature, that the oft-repeated name of Wissner remain in the confessions? It is difficult to conjure up any legitimate explanation for these rulings; in his brief in the New York Court of Appeals the District Attorney was able to summarize the confessions without ever mentioning Wissner's name, and without detracting in the least from their coherency.

There followed occurrences shocking in character, which could not have been brought about had petitioner's reiterated requests for deletion of his name been granted.

The District Attorney, in his summation, read extracts from each of the confessions to the jury. The brief excerpt thus read verbatim from Stein's confession mentioned Wissner's name five times (R. 2698).

From Cooper's confession he read as follows (R. 2697):

"I made a turn onto Route 117, going south, and as I turned, I heard a shot. I stopped the truck about fifteen or twenty feet on Route 117 from the point of entrance to the Digest plant and looked back at the Digest truck and saw Wissner; * * *."

These were the *only* portions of the confessions of Cooper and Stein which the District Attorney elected to read verbatim to the jury during his summation—although of course the entire confessions had been read to the jury during the trial.

Subsequently, the Trial Court, in charging the jury, summarized the confessions in *toto*, giving minutely detailed prominence to all the accusations against Wissner contained therein. Curiously, the Court, like the District Attorney, took pains to *quote* verbatim from the confessions only a portion particularly harmful to Wissner, reading in part from Stein's confession (R. 2754):

"While trying to clamber inside the Digest truck, I heard a shot and I glanced up at the man who was

seated alongside the Digest truck driver and saw that he was bleeding about the face, and that Wissner started climbing over him into the back of truck."

The Court continued:

"Stein further said that when they were tying up the driver of the Reader's Digest truck, he said, 'Please don't hurt me,' and Wissner remarked, 'Shut up, or you'll get what the other fellow got.'"

Surely the Trial Court must have recognized that Wissner particularly would be prejudiced in the minds of the jurors, and improperly so, by including the following in its summary to the jury of Cooper's confession (R. 2748):

"He said * * * that on the way down, Wissner told the rest of them when he approached the truck, he had shown the gun and shouted to the driver to get out from behind the wheel and open the door. The driver started to attempt to drive the truck and Wissner therefore had to shoot him."

It will be noted that the portion of Cooper's confession to which the jury's attention was thus directed at the close of the case could have little or no probative value against Cooper.

This Court may have difficulty locating in the Trial Court's charge the putatively protective instruction concerning Wissner that one might ordinarily expect to find coupled with a review of such evidence; it is necessary to search fourteen pages further along in the charge (R. 2769), in another portion thereof, for the instruction that the confessions were only to be considered against those making them. This instruction ostensibly was designed to erase from the jury's minds what had been so painstakingly implanted there; actually, it would seem to have been devised as a pro forma compliance with procedural requirements to protect against reversal.

As was stated in a different but similar context by Mr. Justice Jackson, concurring in *Krulewitch v. U. S.*, 36 U. S. 440, 453:

"The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. U. S.*, 332 U. S. 539, all practicing lawyers know to be unmitigated fiction."

If their confessions were inadmissible against Cooper and Stein, the foregoing circumstances compel the conclusion that petitioner Wissner could not and did not receive a fair trial with these confessions before the jury, and that he was deprived of his constitutional right to due process.

But even if the confessions were admissible against Cooper and Stein, petitioner contends that under the circumstances their admission at a joint trial of the confessors and petitioner without deletion of petitioner's name, deprived petitioner of due process of law and vitiated petitioner's trial.

Respectfully submitted,

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APPENDIX

Statutory provisions to which reference is made in the foregoing brief:

Penal Law of New York, Sec. 1044:

“The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: * * *

“2. * * * without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise;”

Penal Law of New York, Sec. 1844:

“A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate, having jurisdiction to take his examination, is guilty of a misdemeanor.”

Code of Criminal Procedure of New York, Sec. 165:

“The defendant must in all cases be taken before the magistrate without unnecessary delay; and he may give bail at any hour of the day or night. As amended L. 1882, c. 360, Sec. 1; L. 1887, c. 694.”

Title 28, Sec. 1257, U. S. Code:

“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *

“(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in

question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

(4940)

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952—No. ~~24~~ MISC.

393

CALMAN COOPER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**REPLY BRIEF OF PETITIONER
CALMAN COOPER**

The petitioner Cooper desires to avoid burdening this Honorable Court with legal arguments, applicable both to him and to petitioner Stein, and already ably expressed in Stein's brief, submitted to this Court, simultaneously herewith, in answer to the respondent's brief.

We desire to reply, however, to some of the respondent's misleading contentions which particularly concern petitioner Cooper.

In our petition and brief we branded and proved the testimony of Sgt. Sayers—who sought to account for Cooper's injuries, noted by Dr. Vosburgh and by petitioner's three attorneys—to be a clumsy fabrication, concocted in a desperate attempt to deceive the jury and our courts (pp. 31-33). Sgt. Sayers' mendacious explanation is repeated by respondent in its brief on page 15, as follows:

“After identifying himself and his companions as police officers, Sergeant Sayers ordered Cooper to take his hand out of his pocket. Sergeant Sayers felt an object in Cooper's pocket. Cooper refused. Sergeant Sayers then grabbed Cooper by both arms, and as

Cooper started to wheel around, Sayers threw Cooper against the building which had a cement wall and then took Cooper into custody (1311)."

At page 30 the respondent further states that "Sergeant Sayers said he had thrown Cooper against a wall hard because he believed his hand held a weapon in his pocket."

Now let us look at Sayers' actual testimony (1311):

"I walked up to Cooper, told him we were police officers, ordered him to take his hand out of his right-hand coat pocket, and when he failed to comply I put my hand on his coat pocket; there was an object in there but it was not what I was looking for, and with that I took him and grabbed him by both ~~both~~ arms," etc.

This Court will note that Sayers put his hand on Cooper's coat pocket, ascertained that there was an object in there, but it was not what Sayers was looking for.

What was that object in Cooper's right-hand pocket, for which he admittedly was not looking? None other than a black notebook (1332).

Sayers, therefore, knew, from having placed his hand into Cooper's pocket, that Cooper had only a notebook, and not a weapon. He therefore had no reason to push or throw Cooper against the wall. He merely created this "violent" episode in an attempt to explain the injuries seen on Cooper four days later by Dr. Vosburgh and others.

We criticize respondent's summary of Sayers' testimony as misleading for omitting the important fact that Cooper had only a harmless note-book in his pocket, which fact Sayers easily ascertained *before* he allegedly pushed Cooper against the wall *once* (1332). The summary is cleverly worded to give this Court the false impression that Sayers thought that Cooper had a weapon in his pocket.

We do not rest our argument alone on an analysis which must appeal to our reason. We reinforce it by Jepperson's testimony—the People's own witness—who, as we pointed out in our main brief, gave Sayers the lie (Cooper's Brief, pp. 31-32).

Respondent, on page 14 of its Brief, strongly vouches for the character and integrity of Jepperson.

We respectfully submit the actual testimony of this witness, concerning this alleged incident, as developed by *District Attorney Fanelli himself* (810):

"Q. When the police picked you up with Calman Cooper, did you see what the police did with Calman Cooper on 120th Street on the 5th of June last? A. Told him to get up against the wall, and he had his hands up and they searched him.

Q. Did they *push* him up against the wall? A. *I wouldn't say that.*

Q. Did you see it? A. No. *I wouldn't say they pushed him; they asked him against the wall and he put his hands up.*" (Emphasis ours.)

Nowhere in the Respondent's Brief is there a single word by which the District Attorney seeks to explain away Jepperson's testimony which flatly proves the falsity of Sayers' explanation.

At page 15 of Respondent's Brief appears the following misleading paragraph:

"The extent of any injuries that Cooper may have sustained during this violent episode at the time of his arrest is unknown".

Unknown?

Jepperson's testimony shows there could be none. Dr. Vosburgh's testimony shows Cooper's injuries cannot be accounted for by Sayers' imaginary "violent episode".

The testimony of Dr. Vosburgh shows that Cooper's injuries could not be a week old, could possibly be six days old (1246), and could have been inflicted on June 5—that is, they could be four days old, (1247-1248). His testimony, therefore, proves that they were inflicted while Cooper was in police custody, for, on cross examination by the District Attorney, he testified that only "some of the injuries" could be accounted for by the fact that Cooper was allegedly thrown against a stone wall by a police officer (1246-1248)—an explanation by Sayers, the falsity of which we clearly showed in our brief (pp. 32-33).

Sayers testified that he pushed Cooper *only once*. Dr. Vosburgh swore that the injuries he found on Cooper could have been caused only "by being thrown against a stone wall *numerous times*" (1253).

We submit the question put by defense Counsel to Dr. Vosburgh and his answer thereto (1253):

"Q. How can any person strike a stone wall and get bruises on both buttocks, the left posterior lateral chest area and the abdomen and the right bicep area—point out to the jury that by being thrown against a stone wall, it can produce all those bruises? A. By being thrown against a stone wall *numerous times*."
(Emphasis ours.)

Thus Dr. Vosburgh the jail physician, and Jepperson, respondent's own "honest business man" (Respondent's Brief, p. 14), utterly revealed the falsity of Sayers' testimony.

Cooper contends that he was held incommunicado (Petitioner's Brief, p. 18). How does Respondent meet that challenge? By pointing out that Reardon, no less, Reardon of the Parole Board, spoke to Cooper!

Reardon was not a neutral witness. Reardon was a frequent visitor at the Police Barracks (1441). Reardon had visited the barracks on Monday night and never spoke to or saw Cooper that night (1441). He was there solely as an arm of the prosecuting authorities (1441). Reardon's presence, therefore, does not, as stated by Respondent, negative petitioner's contention that he was held incommunicado (Respondent's Brief, p. 20).

Further at page 20, the Respondent points out that "Reardon declared that at this time (Tuesday night), Cooper did not complain to him that he had been beaten or threatened" (1449).

What a distorted impression that gives to this Court. A fair statement would have been that Cooper did not complain at the barracks to Reardon, in the presence of State Troopers, because Reardon, as we pointed out in our main brief, never saw, and never spoke to Cooper alone, but always in the presence of one or more State Troopers (1442, 1443, 1464).

The Trial Record shows the following (1464):

"Q. You never saw this defendant alone there?

A. No.

Q. In the barracks? A. No.

Q. There was always some state trooper present?

A. Yes.

Q. You never asked permission to speak to Cooper alone so that you could ask him whether he had been beaten by the state troopers, did you? A. No.

Q. You never did that? A. No.

Q. You were, therefore, in no position to state that he was never beaten and never intimidated, isn't that a fact? A. I did not make any such statement.

Q. Well, you did testify that these confessions are voluntary in substance and effect? A. Yes.

Q. Now, isn't it the truth that you are in no position whatever to state whether this defendant was beaten before you saw him, and whether, when you spoke to him, there was not a continuing fear upon this defendant through the presence of armed policemen, isn't that a fact? A. I can only testify to what I saw and heard."

And again at page 21, the Respondent states that "Reardon noticed no wounds, cuts or bruises and Cooper did not complain that he had been mistreated, threatened or beaten", on the evening of June 6 (1449). Of course Reardon did not notice any. A reading of Dr. Vosburgh's record (2971) and of Mr. Todarelli's detailed testimony of what he saw (1260-62) shows that none of the injuries complained of were on parts of Cooper's body that were visible to anyone, unless Cooper removed his clothing, which of course, Reardon never asked Cooper to do (1442, 1480).

Reardon came, not as a friend of Cooper, but, as his conduct showed, as a helper of the State Police.

The Respondent, unable to answer Cooper's analysis of the worthlessness of Reardon's testimony concerning the voluntariness of Cooper's confession, ignores the strictures detailed by us, and trusts to silence and evasion to come to their rescue (Cooper's Brief, pp. 29-31).

The failure of the ~~Respondent~~ to answer pointed questions in our brief is a most eloquent admission that Cooper's confession was clearly extorted.

Nowhere in the Respondent's Brief is there an answer seeking to justify the conduct of the District Attorney and his assistants—a conduct of avoidance and evasion of specific charges made on June 10 by telephone and telegram (Cooper's Brief, pp. 25-31). Nowhere is there an

answer justifying their refusal to have another Doctor examine Cooper, when the charge was specifically made on June 10, that Dr. Vosburgh's record did not show "true extent of injuries" Cooper received (2973).

The District Attorney himself, by refusing to have another doctor examine Cooper on June 10, created the necessity for the testimony of Mr. Todarelli, associated with the defense, to prevent a miscarriage of justice on an important issue.

Nowhere does the District Attorney justify his opposition to a medical examination of Cooper when the Defense requested it on June 13, before Judge Gallagher.

Nowhere does the District Attorney answer our proof that he showed utter disregard of our charges, and failed to seek verification of their truth or falsity, because, as he and the troopers well knew, as shown by the convincing proof in this record, the charges were indeed well founded.

The respondent's brief is replete with distortions and half-truths; but it would serve no purpose to list and answer all of them.

We shall list one more, however. On page 43, respondent states that "there is no proof in this record that either Cooper, Stein or Wissner were questioned in relays."

There is absolutely no excuse for such a brazen distortion and deception in a brief before this Honorable Court. We respectfully refer to our main brief (pp. 17-18), where, with page references, we list the relay participants, Sgt. Barber, Sgt. Sayers and Trooper Buon, the three of whom questioned Cooper in turn on Monday and Tuesday, repeatedly.

There was in law no issue of fact as to the legality of the confession to submit to a jury, for it was clearly barred under our constitutional guarantees.

This Court cannot, we respectfully submit, overlook the positive proof that Cooper's confession was extorted, and give, by implication, its stamp of approval to the methods by which it was illegally obtained.

Respectfully submitted,

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THOMAS J. TODARELLI,
DANIEL J. RIESNER,
of Counsel.

Dated, October 2, 1952.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 393

CALMAN COOPER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S BRIEF

PETER L. F. SABBATINO,
Counsel for Petitioner.

PETER L. F. SABBATINO,
THOMAS J. TODARELLI,
DANIEL J. RIESNER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 393

CALMAN COOPER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF NEW YORK

BRIEF FOR PETITIONER CALMAN COOPER

The Opinion Below

The Court of Appeals of the State of New York affirmed without opinion the judgment of conviction and the sentence of death¹ imposed upon petitioner (303 N.Y. 856).

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on March 6, 1952. On June 3, 1952, by order of Mr. Justice Reed, the time within which to file

¹ Mr. Justice Jackson granted a stay of execution on April 7, 1952, pending a determination of an application for a writ of certiorari.

a petition for a writ of certiorari was extended to June 6, 1952, on which date the petition and accompanying brief were filed.

The jurisdiction of this Court was invoked under 28 U.S.C.A. 1257 (3), Rule 38 of the Rules of the Supreme Court of the United States, and the remittitur of the New York Court of Appeals, amended by order of that Court, dated April 18, 1952, to add the following:

"Questions under the Federal Constitution were presented and necessarily passed upon by this Court, viz: whether the admission in evidence of the confession of the defendant Cooper violated his rights under the Fourteenth Amendment to the Constitution of the United States, * * *. This Court held that the rights of the defendants under the Fourteenth Amendment to the United States Constitution had not been violated or denied." (303 N.Y. 982).

At the trial, the People were permitted to put into evidence a confession² of petitioner Cooper, over his objection and exception, that such admission was in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution, an objection seasonably asserted at every stage of the trial,³ as well as on appeal to the Court of Appeals, in the Brief and on the oral argument.

On October 13, 1952, this Court granted leave to proceed *in forma pauperis* and granted Certiorari "limited to the question as to the admissibility of the confessions" (73 S. Ct. 53, No. 3).

² People's Exhibit 59, Rec. 2875-2886; 1280.

Note: The exhibits appear in volume V, only one copy of which was available to petitioner for filing herein.

³ Rec. 160, 1174, 1275-1280; 1305, 1444, 1451, 1520, 1521, 1522, 1542, 2273-2275. These numbers, as well as numbers in parentheses hereinafter used in this Brief, unless otherwise indicated, refer to page numbers of printed trial record.

The Crime Charged

The indictment charged the crime of Murder in the first degree, based upon felony murder,⁴ committed by Calman Cooper, Harry A. Stein, Nathan Wiessner, as well as by Benny Dorfman, whose trial, on motion of the District Attorney, was severed, and who testified for the prosecution (8-11).

Question Presented

Did the admission in evidence of petitioner's confession constitute a violation of his rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States?

Specification of Errors

The right of the petitioner to be accorded due process of law under the provisions of the Fourteenth Amendment to the Constitution of the United States has been invaded and violated:

A. When a confession is admitted in evidence against the petitioner on trial for his life, conceded by the testimony of State Police to have been obtained from him some thirty-six hours after he had been arrested on the street near his home in the City of New York, and thence carried off to isolated barracks of the State Police in a County outside the city of New York, where he was incarcerated incommunicado, without opportunity to consult with friends or counsel, kept handcuffed, fully clothed at all times, and subjected to incessant questioning by relays of State Troopers for at least twenty hours between the evening of June 5th and the late evening of June 6th, before confessing, and where arraignment was delayed for about eighty-five hours,—a delay held by the trial court to have been in violation of the laws of the State of New York.

⁴ Section 1044 of State Penal Law.

B. When, in addition to the above proven facts, there is put in issue the petitioner's claim that he was physically beaten to extort his confession, and there is indisputable evidence of marks upon the petitioner's body, which could have been caused only by the infliction of physical violence, a jury is permitted to speculate that such physical injuries may have been self-inflicted, in the absence of any competent proof whatever that they were or could have been self-inflicted, and thus ignore such marks of physical injury as indicating that the confession was forcibly extorted in violation of the petitioner's right to due process of law.

Statement of the Case

The facts of the case on the issue before this Court, as testified to in the main by the State Police, prosecutor, jail officers, jail physician; and other State and County officers, are as follows:

On April 3, 1950, four robbers held up a truck owned by the Readers' Digest Association on its private driveway, at Chappaqua, New York (211). William Waterbury, accompanied by Andrew Petrini as messenger, was driving the truck to deposit company funds in a local bank (214). A single shot fired by one of the robbers (215) passed through the window glass of the door of the truck and caused Petrini's death a few hours later (167; 171-2). The robbers escaped with three bags containing checks and currency, the property of the Readers' Digest Association.

The Arrests

On Monday, June 5, 1950, at about 9:10 A.M., on the public street of New York City outside of his home (1310-1311), seven or eight State Troopers in civilian clothes (1337-8), accompanied by a New York City detective (1965), arrested Calman Cooper as a participant in the murder (1181, 1364, 1400, 1423, 2071).

At this same time and place they also arrested and handcuffed petitioner's sixty-five year old father (790, 1311, 1365, 2998).

Arthur Jeppeson, a subsequent prosecution witness, who was present at these arrests, was also taken into custody at that time (790).

The police took the prisoners to the East 67th Street Police Station (798, 1965), where they were not booked by any of the arresting officers (1335, 1341), although the law, the police admitted, required that they do so (1963). Petitioner and his father were not placed in available cells, but were hidden away, handcuffed, in a police bedroom (1337), where they were confined until 1:00 P. M. (1311). They were then spirited away by State Troopers to their Barracks at Hawthorne, New York, located forty miles from the place of arrest, in another County, where they arrived at about 2:00 P. M. (1311, 1312).

Calman Cooper's brother Morris, at approximately 4:00 P. M. of that same day, was arrested at a New York City air terminal (2039-2040), while waiting for a plane to Florida, in which state he resided (2045).

The State Troopers never notified the District Attorney of Westchester County of these arrests, either when petitioner and his father were at the East 67th Street Police Station or upon their arrival at the Barracks (1225, 1341).

The co-petitioner Stein was arrested on Tuesday, June 6, at 2:00 A. M., in his brother's home in New York City (1958, 1960), by State Troopers dressed in civilian clothes and by several New York City detectives (1850). They failed to book Stein, as they failed to book the Coopers, in any New York City Police station (1963), but, after driving away with him from his home in one unmarked car, transferred him to another unmarked and privately owned car (1699), and carried him away to the Hawthorne Barracks (1689).

The co-petitioner Wissner, together with his wife who was present at their breakfast in a restaurant adjoining his place of business, on Wednesday, June 7, 1950, at about 9:00 A. M., was seized by plainclothed State Troopers and New York City detectives. The arresting officers placed them also into privately-owned cars and, without booking them in any New York City Police station, hustled them away to the same Barracks (1325, 2300, 2311, 2312, 2316).

The State Troopers admitted that they knew that the arrests were of importance, that the District Attorney was interested in solving this murder case, and that, prior to these arrests and immediately after the commission of the crime, he had interviewed witnesses in this case, yet they did not call upon the District Attorney to come to question Calman Cooper (1341, 1367, 2001, 2008), who had been arrested as a participant in the murder (1181-1364-1400-1423). The police testified that they were going to do the "questioning" themselves (2001). The State Police Commander of the Barracks, Captain Glasheen, testified that there are thirty-five men in the Bureau of Criminal Investigation attached to his Barracks, that they were all on duty on Monday, June 5, that it is their duty to "question" the prisoners, and they do not have to be ordered to "question" a prisoner but that "they do it of their own will" (2004-2005).

The State Police Barracks of Troop K

The New York State Police Barracks of Troop K, at Hawthorne, N. Y., are located in a secluded rural section of Westchester County. The buildings are completely isolated, with no surrounding buildings, and with no possibility of any outcry being heard, or of occurrences therein being witnessed by any outsider (1339). The nearest building, a schoolhouse, is distant "1,000 feet or more" from the Barracks, and was not inhabited during many of the hours

during which petitioner was being "questioned" (1339, 1340, 1554, 1599).

There are no detention cells at the Barracks (1369), and no sleeping quarters for prisoners or suspects (1369, 1929). A prisoner therein must rely upon the generosity of the State police for his food (1208, 1907, 2010). Captain Glasheen testified that he determines when someone in custody at his barracks eats, sleeps, or uses toilet facilities; that he had the arbitrary power to enforce his wishes in those respects, and that there is no supervisory power to check whether or not a prisoner therein is being well treated (2010-2013).

The Bureau of Identification Room at Barracks Wherein Petitioner Was Confined

This Bureau of Identification Room (hereinafter referred to as B. of I. room) was fifteen by twenty feet in size (1394, 1202), in which four persons usually worked, in the midst of at least two desks, five chairs and fourteen filing cabinets (1344, 1635, 1636). Other Troopers go there to examine official records (1403). This room is not in the main building, but is two hundred feet away from it across a courtyard (1910, 1598). When petitioner Cooper was confined therein, lights burned in this room throughout the night (1431). One window looks out into a courtyard, the other window looks into the direction of a parkway, with houses visible one-half mile away (1599, Exh. B.B., 1602, 2964).

Petitioner Cooper never saw his co-petitioners during all the detention period at the Barracks because he was held in the B. of I. room, while Stein was being held in a basement locker room of the main building (1905), and Wissner was hidden away in still another basement billiard room (2020). Petitioners, after their arrest, saw each other only when they were produced in Court for arraignment, hand-

cuffed to State Police, and surrounded by many other law-enforcement officers (Exh. 62, 1325, 2894).

The Detention at the Barracks

Petitioner was photographed and fingerprinted at the Barracks between 2:00 and 3:00 P. M. on Monday, June 5, (1177, 3006). About a half hour later he was delivered to the B. of I. room (1181-1182), where he was seated, handcuffed, in a chair (1183, 1390 1638) and guarded by at least three armed, uniformed Troopers (1390, 1392).

Petitioner's father and his brother Morris were also photographed and fingerprinted (3002, 3004) by the troopers, who consider this procedure a regular routine (1185, 1191); each was given separate criminal identification numbers.

The fingerprints, photograph and pedigree (Exh. G.G.G., 2998-2999, 1408; Exh. K.K.K., 3002, 1550) of the father were taken, although the arresting officer, Sergeant Sayers, admitted that he did not charge the petitioner's father with a crime (1364) nor did he charge him with anything else (1365). Although the printed form of the father's arrest card (Exh. G.G.G., 2999a, 1408) provides for a "Brief history of Crime Committed", the card alleges *no crime* against the father who, fingerprinted and photographed, was kept incarcerated in handcuffs (1371) for *two and a half days* (1374-1375), without anyone ever questioning him during that time (1366, 1368, 1369, 1374). He was held, the police admitted, without any legal sanction except their own arrogation of authority (1371). During the trial, the District Attorney, in chambers, brazenly argued—in the face of all the preceding facts—"that there is no proof of incarceration of Cooper's father"; but that "there is proof that he was up in the Barracks" and "it is open to the public (1304)". No report or record was made available to show

why he was arrested or why he was released after arrest and detention, even though the regulations of the State Police required it (1409-1410).

Beverly Wissner, wife of one of the co-petitioners, seized at the time of her husband's arrest solely because she was with him, was held, like the others, incommunicado and under guard at the Barracks (1665-1666). She was compelled to sleep, fully clothed, on a mattress on the floor in the same room where petitioner Cooper was kept (1656-1657). A day and a half after her illegal incarceration (1661), ostensibly of her own free will, but actually under duress, she executed, in order to regain her freedom, a general release absolving Sgt. Sayers and other officials (Exh. S, 2960, 2255). That instrument, allegedly, but fraudulently, attesting that she signed "without compulsion of the authorities, and upon my own free will", was witnessed by Lawrence X. O'Neill, a stenographer of the District Attorney's office. The facts implicit in the execution of that instrument—she was imprisoned for thirty-six hours without any legal sanction—gives the true measure of voluntariness in the concept of the State Police. Such State Police "interference" with an individual's "person or liberty"—to quote from the instrument—had, in fact, the approval of their highest superiors, and was admittedly so "usual" that they found it necessary to have mimeographed forms of general releases handy in the Barracks (2251, 2256, 2257).

The Questioning

Sergeant Barber of the State Police admitted that he began "questioning" petitioner Cooper in the presence of armed guards (1393, 1394, 1403, 1404), at 8:00 P. M., on Monday night, June 5, eleven hours after his arrest (2072). He "questioned" Cooper for five hours (2074, 2077, 2081). Sergeant Sayers (1344, 1352, 1353) and Trooper Buon

(2099, 2100) were with him during those five hours and *they, too, participated in the "questioning"* (2073). Cooper persisted in his denials of complicity (2099, 2117, 2121). The troopers admitted that their questioning of Cooper resulted in failure (2075, 2102). When Sergeant Barber retired at 4:00 A. M. Tuesday—nineteen hours after petitioner's arrest—Cooper had not confessed (2080).

Sergeant Sayers and Trooper Buon resumed their "questioning" on Tuesday morning and "questioned" Cooper until noon time (1357, 1361, 2075, 2102). Sergeant Barber questioned petitioner most of the time from Tuesday morning until around dinner time (1403-1404-2074). Trooper Buon, too, questioned him "on and off" all afternoon on Tuesday until about 6:00 P. M. (2119-2121) in the presence of armed guards.

District Attorney Fanelli, an alert prosecutor who was on the scene of the crime in less than one hour after its commission (1105), and who was interviewing witnesses about one hour after the crime (151, 205, 279, 450, 451, 2689) testified that he learned of Cooper's arrest only on Tuesday afternoon—that is, about thirty-six hours after Cooper's arrest—when he was questioning, not Cooper, the then suspected participant in the murder, but Jeppeson, who had been taken into custody with Cooper the day before (788, 789, 1225).

We know from the record, of course, that, at the time this belated knowledge came to the prosecutor, that Cooper had not confessed. We therefore submit to this Honorable Court that the state police deliberately withheld such knowledge from the prosecutor to have ample time to extort a confession. Other more damning reasons for his failure to go to the Barracks at once will readily occur to this Court without the necessity of putting them in words.

Accepting Mr. Fanelli's sworn testimony, the police with-

held from him knowledge that they had arrested Cooper, an alleged participant in the murder, yet, when he admittedly learned of Cooper's arrest thirty-six hours after its occurrence, he did not even telephone to the Barracks to inquire about the petitioner Cooper (1225-1226).

What is of equal importance, if not more so, is the prosecutor's complacency in not complaining to the State Troopers about their failure to carry out the clear command of the State law to arraign the petitioner Cooper before a magistrate "without unnecessary delay" (1227).⁵ Although Dorfman—much later—was arraigned on the night of the very day of his arrest, the District Attorney did nothing to cause the arraignment of Cooper on Tuesday, after he then knew of Monday's arrest, nor on Wednesday, nor on Thursday morning or afternoon, despite the fact that the new Castel Court was available for arraignments *at any time or any hour around the clock* (1270). The District Attorney stated that he was under the impression—contrary to the command of the State statute—that the law tolerates "a certain reasonable delay" (155-1226).

Captain Glasheen, commander of Troop K, was of the opinion that he could wait until *the rest* of the suspects were taken into custody (2008). The troopers testified that, prior to the taking of the confessions, *none of the questioners of Cooper had made a single written notation at any time of what their "questioning" revealed for their five hours work on Monday night and for their work on Tuesday, from morning until 6:00 P. M.* (1352, 1357, 1361, 1362, 2072, 2074, 2101). Nor did the State Troopers use as stenographer Mrs. Klaus, a civilian stenographer attached

⁵ Section 165 of the Code of Criminal Procedure, Rule 5 of the Federal rules of Criminal Procedure, like the state statute, provides for arraignment "without unnecessary delay". Section 1844 of the state Penal Law makes it a crime to violate Section 165 of the Code of Criminal Procedure.

to Troop K (1571), who usually works in the very room where Cooper was held (1634), who testified that she was ready and able to take a statement on Monday afternoon (1639). Nor did the State Police use Corporal McLaughlin, himself a stenographer, who was present during petitioner's detention and questioning in the B. of I. room (1442, 1443, 2103). McLaughlin in fact *worked* in the very room (1195) where he later took down Cooper's confession on his typewriter (1171).

Troopers testified that the petitioner Cooper on Tuesday night was brought into the presence of his father, each separately handcuffed (1372).

Sayers, not a mere trooper, but a sergeant and senior officer in charge (1338), sworn to uphold the State and Federal Constitutions, upholder of our Bill of Rights and our American liberties, testified that he agreed, doubtless magnanimously, to release Cooper's sixty-five year old father,—at the moment admittedly incarcerated illegally, against whom no charge had been lodged—if petitioner confessed. Petitioner Cooper, a former six-year inmate of Dannemora State Hospital confined therein for "psychosis, with psychopathic personality", (Exh. S.S.S. T.T.T. U.U.U., 2487; 2064; 2487-2508), and who, as we shall later show, had been brutally beaten by his "questioners", is alleged to have accepted the proffer by confessing to the crime (1372). Balzae himself describes no scene more poignant and more shocking to one's moral conscience than this alleged bargain, to free a father acknowledged to be innocent, only in exchange for an admission of guilt from his suspected son.

The father's release, however, occurred, not on Tuesday night, after the confession, but almost twenty-four hours later, on Wednesday, June 7 at about 9:00 P. M. (1375-1380).

John Reardon, attached to the New York State Division of Parole (1441), testified that he was at the Barracks on Monday, June 5, at 7:00 P. M. (1441). He did not see petitioner that night, although he remained there until 9:00 P. M. (1441), and although he then knew that the petitioner was there on a murder charge (1462). He returned on Tuesday, June 6, at about 7:00 P. M., and, at about 8:00 P. M., saw the petitioner, whom he had never seen prior to that evening (1441, 1442, 1448). He never saw, and never spoke to petitioner alone, but always in the presence of one or more State troopers (1464). Reardon further testified that he called for his superior—State Parole Commissioner Edward Donovan—who, in response to such call, appeared at the B. of I. room on Tuesday, June 6, at 10:00 P. M. (1450); that, as a result of conversations between Commissioner Donovan and petitioner Cooper, wherein the commissioner made certain promises to petitioner (1452-1453), the petitioner thereafter gave an oral confession (1453-1454) and, at some time after 11:00 P. M., the petitioner began his typewritten confession (1459-1460, Exh. 59, 2874-2886) which ended and was signed by petitioner at about 2:30 A. M. of June 7 (1317-1318, 2068). Commissioner Donovan added his name to the confession as a witness, but was not called upon to testify by the prosecution.

There can be no doubt but that the purpose for which petitioner was held incommunicado for three and a half days at the State Police Barracks was solely one to afford the State Police an uninterrupted illegal opportunity to extort from the petitioner, by whatever means they were disposed to use, the confessions that were later used against him.

The Arraignment

The arraignment took place on Thursday, June 8, at about 10:00 P. M., *more than eighty-five hours after petitioner's arrest* (1268, 2150).

Sgt. Sayers, evidently trying to cover up the People's failure to arraign the petitioner during the usual daytime Court hours, and to account for a late secret night arraignment on Thursday for one arrested on Monday morning, testified that the arraigning magistrate was available "only at night" (1328). That was false, for the clerk of the arraigning Court testified that the Court was available for arraignments *at any time or any hour around the clock* (1270).

The three petitioners appeared before the Court, handcuffed (1330) and surrounded by law-enforcement officers. Besides the judge, petitioners, and photographers, there were, in this fifteen by twenty or thirty feet courtroom (1327), at least fifteen law-enforcement officers crowded around the petitioners (1326-1327, 1205, 1269, 2130). None of the petitioners was represented by Counsel (2017). None had a single friend or relative present. Not a single member of the Bar, excepting the judge and prosecutors, was present that night (2177-2178). The District Attorney's stenographer testified that the petitioners "looked none too clean" (2152). The Courtroom picture (Exh. 62, 2894, 1325) shows the petitioner Cooper shielding his face with his coat to prevent his picture being taken. The minutes of arraignment show that, during questions directed at Cooper, the Court ordered Cooper to put down his coat "so I can see you" (3016).

The District Attorney admitted on June 13, 1950, in proceedings before the then County Judge Gallagher, that on the Thursday-night arraignment of June 8, petitioner Cooper "complained to the Court about photographers be-

ing present"—(2978). The minutes of that June 8 arraignment (Exh. R.R.R. 3016-3018, 2017) fail to show that complaint, even though the prosecutor, who was present at the arraignment, was giving his recollection of what had occurred only five days before (2974). The challenge to the integrity of the minutes of the arraignment is based, therefore, upon the statement of the prosecutor himself. We cannot say, from the silence of the minutes, because of their inaccuracy and incompleteness, whether Cooper did or did not complain of police brutality. But, under the facts of this case, it is of no significance here whether Cooper did or did not complain of a beating before the committing Magistrate. He had then been within the absolute power of the State Troopers for *three and a half days*. There was no proof as to whether his mind or the mind of Stein or Wissner was functioning; whether they had had sufficient sleep or food; or whether they had received any drug. The State Troopers admittedly continued to have custody of Cooper and his two co-petitioners *after* the arraignment (2017) until they delivered them to the jail about midnight (2018).

Despite Captain Glasheen's and District Attorney Fanelli's attempted justification for the delayed arraignment of the three petitioners, the Court held as a matter of law that the delay was unnecessary (2777).

The Jail

Allen, the County Jail Warden, testified that Sergeant Sayers brought the petitioners into the County Jail at 11:45 P.M. on Thursday, June 8, 1950 (1273, 1858).

To rebut later, when we discuss the baseless explanation of the Respondent to account for the injuries which the petitioners had when the State Troopers released Cooper, Stein, and Wissner from their clutches, we detail their cell locations in the jail from the time that Sgt. Sayers left

them at the County Jail until they were examined by the jail physician.

The three petitioners were separately locked in widely separated cells in different cell blocks (1868, 1869, 1872, 1875, Exh. Q.Q.Q., 3014, 1872). Stein's cell was on one extreme end of "B" Cell Block, Cooper was on the other extreme end of "A" Cell Block (1866-1867). No other prisoner occupied any cell on the gallery on which Cooper was held; and no other prisoner occupied any cell on the gallery on which Stein was held. They were completely isolated from one another and from any other prisoner (1869). The two cell blocks shown in the diagram (Exh. Q.Q.Q., 3014) were three and one half feet apart and fifty feet in length, with solid walls between them (1870). One prisoner could not see another in his cell (1871). Wissner also was in a cell by himself with empty cells on his gallery. His cell is not shown in the diagram in evidence as it was in a distinctly different part of the jail (1882). All three petitioners were kept in solitary confinement (1875). Allen further testified that no reports were made to him that petitioners had incurred any injuries in the jail (1875-1876).

Dr. Vosburgh's Examination of Petitioners at the Jail

The jail doctor, a County appointee (1236), as shown by prison records contemporaneously made by him, arrived at the jail on Friday, June 9, at 9:45 A.M., and left at 11:30 A.M. (Exh. O.O.O., 3008, 1753, 1758). He therefore spent a total of one and three-quarter hours in the jail that morning. He testified that the time of his arrival was not indicative of the time when he commenced to examine Wissner, his first patient. There is a wait of three, four, perhaps five minutes after one prisoner leaves the clinic and another enters (1861). He examined ten pris-

oners that morning (Exh. O.Q.O., supra), including the three petitioners who were brought separately from their cells to the clinic, and examined separately from each other or any other prisoner (1860, 1861). Each of the examination reports which he filled out at the time of examining the three petitioners contained *thirty-two* separately listed classified items which required his examination and notation (Cooper; Exh. B.B.B., 2971, 1240; Wissner, Exh. P.P.P., 3011, 1781, Stein, Exh. 65, 2909, 1734).

It is therefore apparent that the doctor could not devote much time to each prisoner.

The doctor, at his first examination of the three petitioners, found bruises and evidence of physical injury on all three (1759). He testified that it was not a part of his duty to communicate with the District Attorney to tell him that he had found the reported bruises on the petitioners. He felt that it was not his duty to inquire *how* they got those bruises and injuries (1759), although he admitted that, in order to treat a person, he must first ask, "How did you come by these injuries or bruises?" (1764). He admitted further, "I don't even ask them" (1766), and that he never asked the petitioners for an explanation of the injuries (1254, 1759). He testified that, when prisoners complain to him of injuries received as a result of police brutality, he "usually" makes a note to that effect on their medical examination report (1243, 1244, 1728), but admitted that there were no such other "usual" notes when he was challenged by the defense to produce them (1729), despite his earlier testimony that all the records he makes are kept at the jail (1711).

We now note only those injuries which Dr. Vosburgh found on each of the three petitioners:

On Wissner, the non-confessing defendant, arrested at 9:00 A.M. on Wednesday, June 7, and the first prisoner he

examined on Friday morning (1754), Dr. Vosburgh noted and officially recorded: "bruises (on) left posterior lateral chest" with "abrasions (on) both shins", evidently open wounds (1771). Dr. Vosburgh also noted a fracture of a rib (Exh. P.P.P., 3011, 1781), later confirmed by the County hospital X-ray report of Wissner, taken three days later, which read as follows: "There is a fracture of the left sixth rib, slightly anterior to the mid-axillary line. The fragments are without appreciable displacement" (2957). On the day that Wissner was X-rayed, Dr. Vosburgh also noted "small ecchymotic areas of both thighs, small ecchymotic area of the left side of abdomen and buttocks (and, a) small lump on head" (3002).

On Stein, second to be examined alone, Dr. Vosburgh reported officially "bruises (on) left bicep area" (2909), "in the left upper arm, between the elbow and shoulder" (1743).

John J. Duff, Stein's attorney, examined him a few hours later, and made a less hurried and more detailed observation of Stein's injuries (1838). He observed that there were "bruises on the left arm, his right arm and left lower ribs below the breast" (1839). Duff observed and made note of the dimensions of the bruises, as follows: "The left arm, area of discoloration and bruises, approximately 7 inches long and 4 inches wide. Right arm, above the elbow, discoloration and bruises about 3 inches long and 1 inch wide. Left lower chest, second, third and fourth ribs, from the floating ribs to the left and below left breast, black and blue marks in area approximately 3 x 4 inches (1840).

The prosecution did not in any way question Duff regarding the true existence and extent of the injuries as he testified, but did in fact concede that Duff would not commit perjury (1845).

On petitioner Cooper, last of the three petitioners examined (3008), Dr. Vosburgh noted "bruises (on the) left posterior lateral chest, abdomen, (in the) right bicep area (and on) both buttocks" (Exh. B.B.B.—2971, 1237-39, 1240), and black and blue marks, and injuries under the left arm-pit (1238-1244).

Mr. Thomas J. Todarelli, a practising member of the Bar for twenty-six years, together with his law partner Peter L. F. Sabbatino, visited Cooper for the first time at the County Jail on Saturday, June 10th. They found there Daniel J. Riesner, another attorney who was then visiting Cooper (1259). Cooper stripped in the presence of the three attorneys. Mr. Todarelli noted the injuries of Cooper on Saturday, June 10, at 2:00 P.M. (1260). A complete description of Cooper's extensive injuries, as noted by Mr. Todarelli, is found on pages 1260 to 1262 of the certified record. Mr. Todarelli's description supplements Dr. Vosburgh's report of the day before (Exh. B.B.B., 2971, 1240). The prosecutor at the trial did not in any way question Mr. Todarelli concerning the accuracy of his testimony concerning Cooper's injuries, as he noted them at his visit to Cooper, nor was Mr. Todarelli's testimony successfully refuted in any other manner. Nor did the prosecutor at that time indicate his dissatisfaction with the sufficiency, accuracy or reliability of Mr. Todarelli's testimony as to these bruises which conceivably could then have required the additional cumulative testimony of Sabbatino, Cooper's trial counsel, or of Riesner.

Dr. Vosburgh further testified that the injuries of Cooper could not be a week old, could possibly be six days old (1246), and could have been inflicted on June 5—that is, they could have been four days old when he first saw them on Cooper (1247-1248). He admitted that blows with a human fist, rubber hose or a club were a competent producing cause of those injuries (1240).

Petitioners' Complaints Concerning Injuries Received at Barracks

Deputy Warden Allen of the County Jail admitted that Cooper's Counsel on Saturday, June 10, at the time of their first visit to Cooper, complained to him, Allen, about State Police brutality against Cooper (1882).

District Attorney Fanelli admitted that Cooper's attorney telephoned to him on Saturday, June 10 (1228-1229). He admitted, following that telephone call, receiving and reading the telegram the attorneys sent to him that same Saturday (1231). He recalled that on that day the attorneys asked him for permission to have a further physical examination of the petitioner Cooper (1284). The District Attorney conceded that Cooper's attorneys complained to him on June 10 concerning Dr. Vosburgh's report of June 9. He further admitted that at that time the attorneys complained about the inadequacy of the prison doctor's examination (1294), and that the telegram contained, in part, the following language: " * * * official records do not show true extent of injuries he (Cooper) received" (Exh. C.C.C. for iden., telegram, 2973, 1232, 1290, 1291, 1307). In spite of these protestations, Cooper's attorneys did not succeed in inducing the District Attorney to consent to an examination by another physician on that Saturday, June 10, or at any other time.

It was the positive duty of the prosecutor, as a quasi-judicial officer, to ascertain the full facts so as to brand Cooper's counsel's accusations as false or to accept them as true. It was easily within his power to have another physician check on defense counsel's accusations. His failure to do so is more than persuasive proof that the charges were well founded.

Swartz, the photographer at the jail in which petitioner was held, testified that he was capable of, and had both

the facilities and equipment for, taking a full length picture of the petitioner, stripped, had he been ordered to do so (2187).

On Tuesday, June 13, Cooper's attorney appeared before the then County Judge, Hon. Elbert T. Gallagher, who subsequently presided at the trial of this case, complained to him about the mistreatment of Cooper and requested that a physical examination of Cooper be permitted (2982-2983). A transcript of Mr. Todarelli's application before Judge Gallagher, showing the resistance of the District Attorney to have Cooper examined, is contained in Exh. D.D.D. for identification (2974-2981, 1258). On June 15th, on Cooper's County Court arraignment, Judge Gallagher again refused to permit a physical examination of Cooper by another doctor (2982-2983).⁶

The then attorney for co-petitioner Wissner also made application on June 15 before Judge Gallagher for permission to have another doctor examine Wissner. The District Attorney opposed this application "vigorously" and it was denied (1873-1874).

District Attorney Fanelli further admitted that the attorneys for Cooper and Wissner sued out writs of habeas corpus returnable before Mr. Justice Flannery, seeking the same relief for a fuller medical examination, but in vain; because of the vigorous opposition of the prosecutor, (1308, 1309, 1873, 1874, Exh. F.F.F. 1283, 2984-88). Simi-

⁶ Mr. Todarelli, on the arraignment, addressed Judge Gallagher, in part, as follows (2982):

"* * * there cannot be any danger whatever of showing to your Honor here in open court the marks of violence that were inflicted upon the defendant and which he now bears, even though a week has elapsed since the last of the beatings took place. * * * I now offer to show your Honor the marks that appear upon this man's body here in open court: If your Honor does not do that I stand prepared to produce a Westchester physician; it can be done in open court or in chambers."

lar complaint was also made on Stein's behalf by Counsel assigned to him on July 24.

District Attorney Fanelli testified that he questioned some of the troopers about petitioners' complaints and accusations (1233); however, he did not recall when he did so. He did not make a stenographic record, nor any other kind of official record, of his interviews with these troopers (1233). He did not make any memorandum whatever (1233). Not a single trooper who took the stand, however, supported the District Attorney, for none testified that he was ever questioned by him about any beating of Cooper. Trooper Buon, one of the trio of "questioners", testified that he was never questioned by Mr. Fanelli, by any superior, or by anyone else as to whether he had ever beaten Cooper (2125). Strange as it may seem, Trooper Buon swore that ~~he~~ had heard about Cooper's black and blue marks *for the first time* only when he testified on the witness stand at the trial (2124).

Captain Glasheen, commander of Troop K of the State Police at Hawthorne, testified that he had never heard that we had sent to District Attorney Fanelli a telegram (2047), nor was he ever questioned by the District Attorney about its contents (2048). As a matter of fact, the first time he had heard of our telegram was while he was on the witness stand, under questioning of Cooper's defense counsel (2048). Captain Glasheen admitted that he was never questioned by the District Attorney, or by anyone else, about the charges of brutality against his troopers made by Cooper's Attorney *in that very courtroom* (2048). Mr. Todarelli's charges before Judge Gallagher were not even called to the attention of any one (2049), and yet this is the same Captain Glasheen who pretended that he was kept informed as to what was going on in this case (1999).

The stenographer, Anna Klaus, was never questioned by

anyone about her knowledge of any beatings of Cooper (1650)..

Corporal McLaughlin, who typed Cooper's confession, was never questioned by the District Attorney about the beatings of Cooper up to the very moment that he was on the witness stand. *He knew of no one in Troop K. that had ever been questioned by Mr. Fanelli* (1217). Dr. Vosburgh's report was never called to Corporal McLaughlin's attention (1217). No one in official authority had ever questioned him about the beatings received by Cooper (1218).

John F. Reardon, a witness to the written confession, testified that he was never told by the District Attorney, nor by anyone else, before he took the witness stand, that the defense claimed that Cooper's confession was brought about by beatings (1466, 1467). He admitted that he had heard at the Barracks that there were newspaper reports about the alleged beatings (1468), but he could not name any specific trooper with whom he had had any such discussion (1448). He never asked to go to see Cooper to seek verification of the truth or falsity of the report. (1469).

Assistant District Attorney O'Brien made the statement, in open Court before the jury, "that the press never did carry a story that the defendant was beaten" (1470). To meet the challenge of the Assistant District Attorney, we offered in evidence a headline contained in the *Reporter-Dispatch*, published on Tuesday, June 13, 1950, in the City of White Plains, where the trial of this cause took place (Exh. III for ident. 1471, 3000). Although the Assistant District Attorney was immediately shown the headline (1471), he refused to retract his statement, the Court refused to direct him to do so (1473), and the newspaper clipping, which disproved the Assistant District Attorney's statement, was denied admission in evidence, over defense exception (1472).

Mr. Reardon, even up to the time that he took the stand, had never telephoned to Mr. Fanelli to check on the charges that Cooper had been beaten (1474). He never sought to speak to Cooper privately before he acted as witness to the confession, to ascertain if Cooper's statement was voluntary (1479), although he had heard of the "Third Degree" (1478). He did not ask that Cooper be stripped to be sure that he had not been beaten (1480). He made no inquiry as to whether Cooper had been fed, or whether he had received water to drink (1484). He made no inquiry as to whether Cooper had slept (1485), nor whether he had been denied toilet facilities (1486). He did not ask Cooper whether he had been forced to stay awake (1486). He never even asked to speak to Cooper's father (1488). Thus, the statement by petitioner Cooper in his confession that it was voluntary (2886) becomes meaningless. Reardon's testimony that he noticed no wounds on Cooper's body (1449-1454), has no evidentiary value, for the wounds of Cooper were beneath his clothing, and therefore not visible to this witness, who at all times displayed utter indifference to ferret out facts to challenge the veracity of the voluntariness of Cooper's confession, despite the fact that Cooper had been, to the knowledge of this witness, under arrest and not arraigned for thirty-six hours when the troopers began to take his written confession.

Sgt. Sayers, a "questioner" of Cooper, admitted that Mr. Fanelli had never informed him and had never questioned him about our accusations of Saturday, June 10th; nor had Mr. Fanelli ever called to his attention Dr. Vosburgh's report (1362-1363).

Summary of Argument

Petitioner Cooper seeks a reversal of his judgment of conviction for Murder in the first degree in the County Court of Westchester County, New York, on the ground

that his rights under the due process clause of the Fourteenth Amendment to the Federal Constitution were violated.

Cooper was arrested in New York City on Monday, June 5, 1950, and taken to police barracks in Westchester County, where he was held incommunicado for eighty-five hours, before he was arraigned in a court of law at 10:00 P. M. on June 8, 1950.

During his first thirty-six hours of incarceration, he was beaten and subjected to questioning by State Troopers in relays, for long hours, without proper sleep or food, was kept handcuffed at all times, under heavy guard, without the aid of friends or counsel.

The State Troopers, at the same time, also arrested petitioner's sixty-five year old father, kept him handcuffed, admittedly without legal basis,—for he was not charged with crime,—and used him as a hostage, in a manacled state, to help induce petitioner, badly beaten up, physically and mentally, to confess to participation in the murder.

When arraigned late at night, eighty-five hours after his arrest, he was not represented by counsel, but appeared, in court handcuffed and surrounded only by law-enforcement authorities.

Less than ten hours after the state police surrendered him and his two co-petitioners to the jail warden, the three of them were examined by the jail physician, who noted marks of violence on Cooper and Stein, who had confessed. On Wissner, who had not confessed, he noted marks of violence which included a fracture of a rib.

The State Troopers and the prosecutor furnished no adequate explanation for the marks of violence found on the petitioners within a few hours after they went from State Police custody into the custody of the jail warden.

The undisputed proof showed that the confession was

clearly coerced out of the lips of the petitioner by the violence of State Troopers, was inadmissible against petitioner as a matter of law under the due process clause, and entitles this petitioner to a reversal of his judgment of conviction because based, in whole or in part, upon tainted evidence.

Argument

The admission in evidence of petitioner Cooper's confession was a violation of the rights of petitioner under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The undisputed facts, as detailed under the preceding Statement of the Case (Brief, 5-33) irresistably lead to the one unavoidable conclusion that the confessions here under attack are the product of coercion, worthless as a *matter of law*, and, as such, were illegally submitted for the jury's considerations.

Unquestionably the undisputed facts herein established that the petitioner was seized and arrested without warrant. He was secreted in a police bedroom in a New York City Station house. He was not there booked as required by law. He was spirited away from his home surroundings, from his family, and from his friends. He was held incommunicado for four days in an isolated, rural police Barracks. He was questioned by police groups in relays during a night, a day, and another night, without friends or counsel present. He was kept fully clothed, in handenffs, during all the time of detention. He was subjected to the mental torture of seeing his elderly father manacled. He was denied arraignment before a Court for eighty-five hours, admittedly in violation of law. Then, when the State Troopers finally surrendered him to the County jail authorities, he bore on his body, as did the two co-petitioners,

the mute evidence of the physical brutality absorbed while in police custody.

We now respectfully invite this Court's attention to the undisputed evidence of the simultaneously acquired injuries which were recorded as being evident on the bodies of the three petitioners when they were examined at the jail by Dr. Vosburgh. These injuries were suffered by the petitioners while in the custody of the police. We have fully discussed in our statement petitioner's complaints of police brutality as made to the Warden, to the District Attorney, to the Judge of the County Court, and to judges of the New York Supreme Court. We have pointed out that the state troopers denied having ever been questioned *by anyone* concerning Dr. Vosburgh's reports which listed some of the injuries found on the petitioners. The State Troopers all denied knowledge of the existence of such reports. They all denied knowledge or participation in the brutality exerted against petitioners. They all denied knowledge of the petitioner's repeated complaints to the various officials and Courts. They even denied knowledge of newspaper accounts which reported the petitioners' claims of brutality at the hands of the troopers at the Barracks. Even Dr. Vosburgh denied that he knew or was told by anyone, that the bruises and injuries he noted were asserted to be the result of police brutality. He denied that he had reported to the District Attorney these injuries which he noted on the three bodies. He testified that it was only immediately prior to the commencement of the trial that he was questioned by members of the District Attorney's staff concerning those reports.

John Reardon, the parole officer, alone, of all the witnesses, admitted the existence of State Police conversations, at the barracks, in mid-June, concerning the newspaper reports of the petitioner's claims of brutality. It is against

this back-drop of apparent collusive evasion, and officially professed indifference and ignorance, that this Court must evaluate the Respondent's attempts to explain away what, for him, is unexplainable. In the face of this record, the Respondent cannot receive judicial absolution of the police brutality documented herein.

At the trial, in the Court of Appeals, and now before this Court, the Respondent urged:

- (1) that Cooper's injuries were the result of a "violent episode" occasioned by Sayers at the time of Cooper's arrest (Resp. Brief in Opp. to Certiorari, P. 30; Rec. 1311);
- (2) that Stein's injuries were as a result of "the grip of a strong man" at the time of his arrest (Resp. Brief in Opp. to Certiorari, P. 29; Rec. 1740);
- (3) "that Wissner, when taken into custody, had injuries; he was under a doctor's care" (Resp. Brief in Opp. to Cert., P. 29; Rec. 2026);
- (4) that the injuries of all three "could have been caused in a number of ways, including self-infliction" (Resp. Brief in Opp. to Cert., P. 30).

The Respondent's "explanations" of the origins of the petitioners' injuries have not the least factual existence.

As to petitioner Cooper, Sgt. Sayers testified (1310-1311):

"I walked up to Cooper, told him we were police officers, ordered him to take his hand out of his right-hand coat pocket, and when he failed to comply I put my hand on his coat pocket; there was an object in there but it was not what I was looking for, and with that, I took him and grabbed him by both arms, and as he started to wheel around, I threw him against the building; I held him there until Sgt. Barber frisked him."

What was that "object" in Cooper's right-hand pocket, for which Sayers admittedly was not looking? None other

than a black note-book (1332). Sayers therefore knew, from having placed his hand into Cooper's pocket, that only a note-book was there and not a weapon. He therefore had no reason to push or throw Cooper against a wall.

The Respondent's Brief in Opp. to Cert., Page 15, purports to give an account of the above occurrence "according to Sgt. Sayers —", and proceeds:

"After identifying himself and his companions as police officers, Sgt. Sayers ordered Cooper to take his hand out of his pocket. Sgt. Sayers felt an object in Cooper's pocket. Cooper refused. Sgt. Sayers then grabbed Cooper by both arms, and as Cooper started to wheel around, Sayers threw Cooper against the building, which had a cement wall, and then took Cooper into custody." (1310).

And at Page 30 of the same Brief, the Respondent further states that:

"Sgt. Sayers said he had thrown Cooper against a wall hard because he believed his hand held a weapon in his pocket."

Not only must Respondent be criticized for making this statement which is not borne out by the Record, but Respondent must be further criticized for giving this Court a misleading summary of Sayer's testimony by omitting from that summary the important fact that Cooper had only a harmless note-book in his pocket, which fact Sayers easily ascertained *before* he allegedly pushed Cooper against the wall *once* (1332). The summary is cleverly worded to give this Court the false impression that Sayers thought that Cooper had a weapon in his pocket and therefore the need for "violence."

Petitioner urges that this alleged "violent" episode was created by Sayers in an attempt to explain away the injuries seen on Cooper four days later by Dr. Vosburgh

and others. We do not rest our argument alone on an analysis which must appeal to our reason, but we re-inforce that argument by Jeppeson's testimony—a witness for the People for whose character and integrity the Respondent vouches (Brief in Opp. to Cert., p. 14)—who, as we shall now show, gave Sayers the lie.

The actual testimony of this witness, concerning the alleged incident, as developed by District Attorney Fanelli himself, follows (810):

Q: "When the police picked you up with Calman Cooper, did you see what the police did with Calman Cooper on 120th Street on the 5th of June last?"

A. "Told him to get up against the wall, and he had his hands up and they searched him."

Q: "Did they *push* him up against the wall?"

A: "I wouldn't say that."

Q: "Did you see it?"

A: "No, I wouldn't say they *pushed* him; they *asked* him (to go) against the wall and he put his hands up." (Emphasis added.)

Nowhere in the Respondent's Brief in opposition to Certiorari is there a single word by which the District Attorney seeks to explain away Jeppeson's testimony which obviously proves the falsity of Sayer's explanation.

That Sgt. Sayers' explanation was a recent, futile, fabrication, is shown, not only by his own words and the testimony of Jeppeson, but by the conduct of the prosecutors as well. The charge of police brutality, we have shown, was made on June 19th, and yet it was not until "September" or "October" or "November" that Sayers said he gave Mr. Fanelli his "explanation" (1334). District Attorney Fanelli conceded at the trial that *he himself never took any statement from Sayers in which Sayers gave his Courtroom explanation of Cooper's injuries* (1333).

That the explanation offered by Sgt. Sayers was a recent

fabrication, born of necessity, is further proved by Dr. Vosburgh's testimony. The jail physician testified that the District Attorney himself had never questioned him about the report that he had filed (1251). *Not until October or November*—i.e., about the time the trial began or was scheduled to begin—did the two assistant District Attorneys who participated in the trial (112), discuss his report with him (1258). However, it is significant that the two assistant prosecutors *did not urge, at that interview, that Cooper had been knocked against a stone wall by anyone, or that someone had grabbed Cooper forcibly by the biceps* (1258).

At page 15 of Respondent's Brief in Opp. to Cert. appears the following further misleading paragraph:

“The extent of any injuries that Cooper may have sustained during this violent episode at the time of his arrest is *unknown* (Emphasis added).

Unknown?—Jéppeson's testimony shows there could be *none* as a result of the arrest incident. Dr. Vosburgh's testimony also shows that Cooper's injuries cannot be accounted for by Sayers' imaginary “violent episode.” On cross-examination by the District Attorney, Dr. Vosburgh testified that only “*some* of the injuries” could be accounted for by the hypothetical assumption that Cooper was allegedly pushed or thrown against a stone wall by a police officer (1246-1248).

Sayers himself testified that he had pushed Cooper *only once*. Dr. Vosburgh swore that the injuries he found on Cooper could have been caused *only “by being thrown against a stone wall numerous times.”* The record shows the following:

Q: “How can any person strike a stone wall and get bruises on *both buttocks, the left posterior lateral chest area and the abdomen and the right bicep area*—

point out to the jury that by being thrown against a stone wall it can produce all those bruises?"

A: "By being thrown against a stone wall *numerous times.*" (1253), (Emphasis added)

Thus, Dr. Vosburgh, the jail physician, and Jeppeson, Respondent's own "honest business man" (Resp's Brief in Opp. to Cert. p. 14), utterly revealed the falsity of Sayers testimony concerning the origin of Cooper's injuries and bruises.

Stein's Brief discusses fully the facts which prove that his injuries were the result of State Police brutality. Your Petitioner is nevertheless constrained to make the barest reference to the simple facts which should clearly negate Respondent's "explanation" that Stein's injuries were the result of a "strong grip by a strong man."

It was testified by Det. Mulligan that Stein was arrested at 2:00 A. M., June 6th, 1950, at the home of his brother with whom he lived in New York City (1958-1960). A Trooper Crowley further testified that, at the time, while Stein was in his underwear washing-up, he noticed nothing abnormal about Stein's arms (1686-7). Stein was handcuffed the moment he left the apartment in custody of the police (1960); and he was handcuffed when he arrived at the Hawthorne Barracks (2082), where he stayed until he, too, was arraigned and jailed, sixty-eight hours after his arrest. Stein was also held under conditions similar to Cooper. He had no bruises on his body when he was arrested in his home; he had them, however, when the State Police surrendered him to the Warden of the jail. It requires no further argument to demonstrate the obvious fact: Stein obtained those bruises at the hands of the State Police while he was in their custody during the period in which his confession was beaten from him.

This Court, in striving to get the true focus of the entire

picture of this case, must of necessity consider the trial testimony as it relates to the co-petitioner Wissner's extensive injuries, which were recorded by the jail doctor. The body of Wissner, the non-confessing petitioner, exhibited evidence of more serious injuries than those of his two confessing co-petitioners. Wissner was not detained at the Barracks for as great a length of time, as were the other two petitioners, before he was arraigned together with them. His "questioning" ordeal evidently was more compressed because he was arraigned thirty-seven hours after his arrest. The injuries found on him showed that the "persuasion" used was also of a more concentrated nature.

In the light of all the foregoing, it would need to stretch credulity to the breaking point to ask any one to believe the shoddy explanation of the Respondent that the injuries shown on the bodies of the three petitioners, when examined by the jail doctor, were separately incurred by them elsewhere other than while in police custody. However, as we have previously noted, the District Attorney in his summation to the jury evidently abandoned the "strong grip-stone wall" explanation of Sayers as being too palpably false and relied on the "self-inflicted" theory, for the support of which there was a total lack of any evidence whatsoever.

If, as the prosecution so energetically stresses, two petitioners confessed voluntarily, why then the sudden need or desire to self-inflict any injury on their bodies?

Wissner, however, had made no confession. Why inflict injuries on himself? None but the gullible could naively believe that Wissner, who had not confessed, would, or even could, during those ten hours following his arraignment, fracture one of his ribs and otherwise seriously injure himself to the extent found by Dr. Vosburgh.

If the injuries were self-inflicted, they could only have

been self-inflicted during the preceding period of ten hours of confinement in the County jail, before their examination by Dr. Vosburgh—hours from midnight to ten in the morning, each petitioner distantly separated from the other. The baseless contention of the prosecutor that the injuries were self-inflicted was exploded by Dr. Vosburgh who testified, in answer to the District Attorney's questions, that Cooper's injuries were "possibly not a week" (old), but "possibly six days" (old)—(1246)—injuries, according to Dr. Vosburgh, producable by blows with a human fist, rubber hose or a club (1240).

In addition to the infliction of physical injuries on petitioner Cooper, there is serious doubt whether he was permitted to sleep, whether he was fed, and whether he was afforded facilities to take care of other natural functions.

It is unquestioned that at the Barracks he was continuously kept handcuffed within the confines of a small office that was encumbered by desks, chairs, and filing cabinets, regularly used by four employees and othrs. It is in this room that he was kept under heavy guard for twenty-four hours a day. It is in this room that he was seen sitting on a chair. It is in this room that relays of troopers questioned him on Monday night and throughout Tuesday, until, late that night, he confessed.

To destroy the inference that he was not questioned and beaten continuously from Monday night until he confessed, the prosecution, through some unreliable police testimony, injected into the case the supposition fact that a mattress was placed on the floor of the office where petitioner was kept, to permit him to sleep, fully dressed and handcuffed. The Barrack mattresses are seven feet long, four feet wide, and eight inches thick (1358). The People would have one believe that that large mattress was placed on the floor in a room fifteen by twenty feet (1202, 1394), when that room

was already crowded with at least two desks, five chairs and fourteen filing cabinets (1344, 1635, 1636).

Anticipating judicial review in higher courts, some of the People's witnesses, all officials, created the fiction that a mattress was furnished petitioner. But the fabrication was too late and too clumsy to exclude the truth from prevailing in this Court.

Sgt. Sayers, on this point, early in the trial, testified as follows under defense cross-examination (1350):

"Q. Now, was there a mattress in the room at eight o'clock at night? A. No, sir.

Q. Monday night? A. No, sir.

Q. There was no mattress there then? A. No, sir.

Q. Tell me; did you see a mattress in that room at any time? A. No, sir.

Q. Did you see Cooper on any mattress at all at any time that night in any room in the Barracks?

A. No, sir." (Emphasis supplied).

Sayers was in a position to know, for he was one of the senior officers in charge of the case (1338) and had done most of the questioning on Monday and on Tuesday.

It is reasonable to infer, therefore, that, between the questioning and the beatings, Cooper had no sleep from his arrival in the Barracks until he confessed.

There is further doubt whether Cooper was fed, in spite of testimony to the contrary, in the light of experiences of others who were confined in those Barracks at the same period. Jeppeson, a witness friendly to the State Troopers and to the prosecution did not receive the "hot food" and "trays" fictionally supplied to the petitioner. Jeppeson was neglected and allowed to go hungry. He had to go into the kitchen himself to help himself secure food (800).

In fact, he had to arrange *himself* to sleep, as he could not sleep on a couch (801).

Dorfman, who had surrendered and had himself photographed as a precaution in case he was beaten, denied he received any meals. He was fed only coffee and a dry baloney sandwich—after they “got all through” “pushing” him from 1.00 o’clock to ten o’clock on the day of his arrest (656, 657).

Assuming, arguendo, without conceding, that there were questions of fact for the jury to consider in connection with the voluntariness of petitioner Cooper’s confession, even then the Trial Court was in error by: (1) Striking from the Record (Rec. 2516) Dr. Cusack’s psychiatric testimony (2498-2508); (2) not allowing the jury to consider the Dannemora State Hospital records (Exh. S.S.S.; T.T.T.; U.U.U., for ident.—Rec. 2487 to 2498); and (3) Not permitting the jury to consider the expert medical testimony relating to Cooper’s mental health (Dr. Cusack’s testimony, Rec. 2498 to 2508). The jury had the right and duty to know that Cooper had been declared insane on three separate occasions and had as a result been incarcerated for more than six years in a State insane asylum under recognized psychosis. Such knowledge, if it had been given to the jury, conceivably might have induced them to find that, because of his mental history, Cooper could not—under the coercive circumstances under which the confession was obtained—have made any voluntary confession.

We respectfully contend, therefore, that this Court has the power to do and should do what the trial Court failed to do—reject the confession as not freely made, because there was in law no issue of fact to be submitted to the jury.

Lisenba v. California, 314 U. S. 219, 240;

Ward v. Teras, 316 U. S. 547, 550;

Ashcraft v. Tennessee, 322 U. S. 143, 145;

Haley v. Ohio, 332 U. S. 596, 599, 600.

Federal Constitutional guarantees protect the petitioner from the use against him of a confession which was palpably extorted and obtained incontestably during a period of time after he should have been arraigned.

State courts do frequently reverse when an extorted confession is admitted in evidence.

People v. Barbato, 254 N. Y. 170, 176;

People v. Mummiani, 258 N. Y. 394, 396.

A Constitutional guarantee, however, is not sustained but impaired where State courts give it only lip service and enforce it only by a repetition of generalities, as a trial judge did here, but sanction its violation by disregarding its protecting nature in actual practice.

It is this Court alone that can sustain the integrity of the due process clause where State Courts shut their eyes to a clear violation and sanction a practice of torture condemned in every civilized state.

A criminal, however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law.

People v. Moran, 246 N. Y. 100, 106;

People v. Levan, 295 N. Y. 31, 32.

Having allowed the confession of Stein and of your petitioner to be marked in evidence and given to the jury, the trial court instructed the jurors that, unless they found that the confessions were voluntary, they should disregard their contents in reaching a verdict (2767); but the trial court improperly refused to instruct the jurors to return a verdict of acquittal if they found that your petitioner's confession was not voluntary (2778, 2781).

The trial court refused, although specifically requested so to do, to submit to the jury, as a specific question, to be answered as part of the verdict, whether your petitioner's confession was brought about by fear induced by threats.

The same request on behalf of Stein was likewise denied (2783).

A judgment of conviction will be set aside by this Court even though the evidence, apart from the confession, might have been sufficient to sustain the jury's verdict.

Lyons v. Oklahoma, 322 U. S. 596, 597;

Malipinski v. New York, 324 U. S. 401, 404;

Gallegos v. Nebraska, 342 U. S. 55.

For all the foregoing reasons, it is respectfully submitted that the confession of the petitioner Cooper, being involuntary and obtained in violation of Section 395 of the Code of Criminal Procedure and of the due process clause of the State and Federal Constitutions, the trial court erred in submitting, over objection and exception, the voluntariness of the confession as a question of fact for determination by the jury.

Conclusion

No matter how clear the guilt of a defendant in any particular case may appear to arresting officers, prosecutors or judges, yet, this Court, speaking for a civilized society, must not countenance a course of conduct which is repugnant to all but those blinded by an interest in a particular prosecution.

Petitioner's rights under the Constitution having been unlawfully invaded, it is respectfully submitted that the judgment should be reversed.

Respectfully submitted,

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APPENDIX**A****UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1**

"nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B**TITLE 28, SEC. 1257, U. S. CODE**

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari where any right, privilege or immunity is specially set up or claimed under the Constitution of the United States."

C**FEDERAL RULES OF CRIMINAL PROCEDURE:****RULE 5. PROCEEDINGS BEFORE THE COMMISSIONER.**

"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person *without unnecessary delay* before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States."

D**CODE OF CRIMINAL PROCEDURE OF NEW YORK, SEC. 165:**

"The defendant must in all cases be taken before the magistrate *without unnecessary delay*, and he may give bail at any hour of the day or night."

E

PENAL LAW OF NEW YORK, SEC. 1844:

"A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

F

PENAL LAW OF NEW YORK, SEC. 1044:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

"2. * * * without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise:"

G

SECTION 395 OF THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK

Confession of defendant, when evidence, and its effect.

"Confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him; unless made under the influence of fear produced by threats,—but is not sufficient to warrant his conviction without additional proof that the crime charged has been committed."